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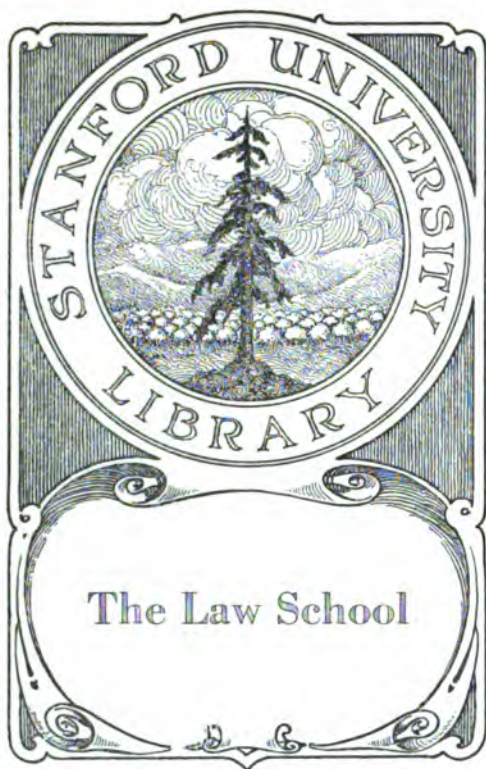
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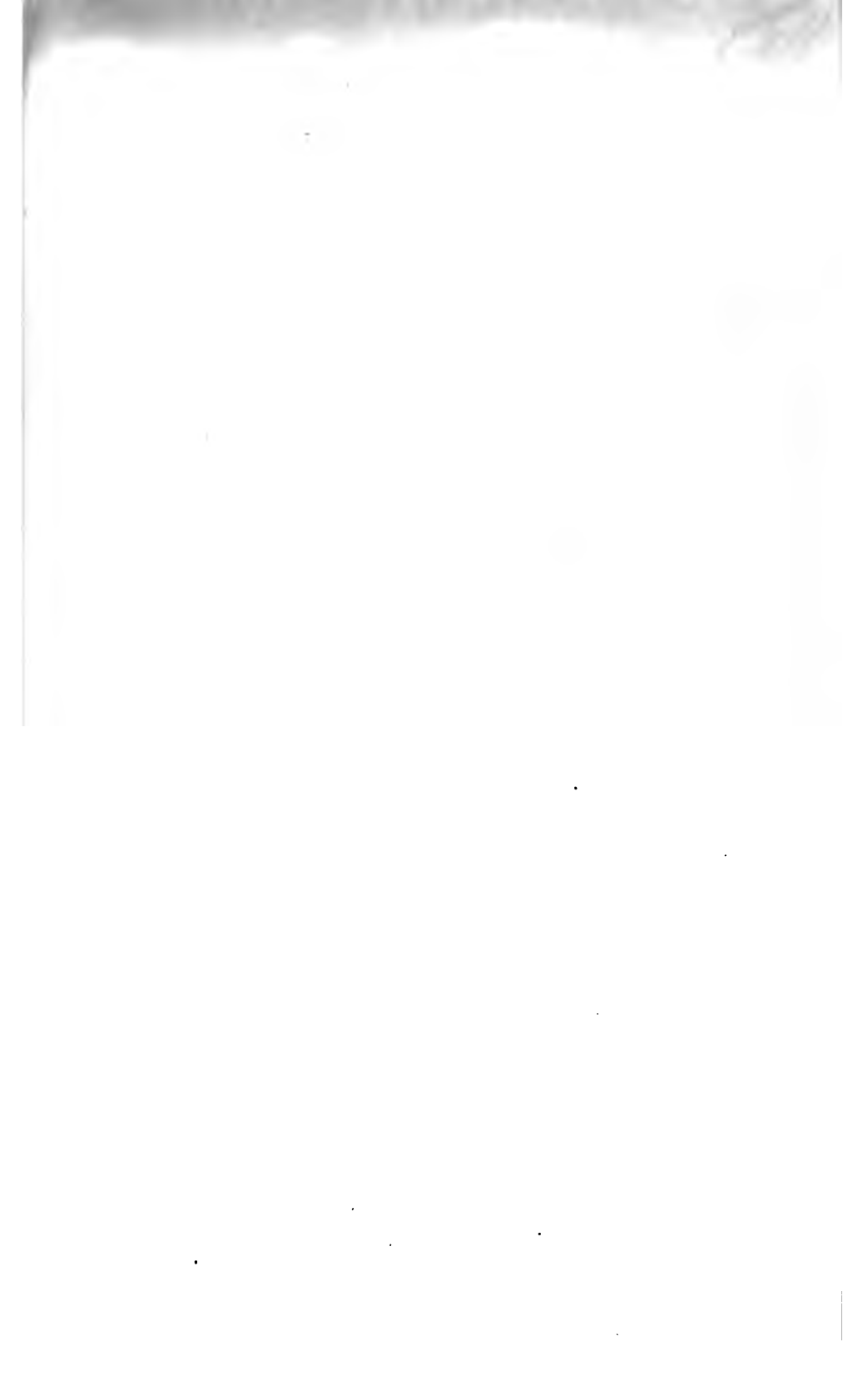
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.



HERETOFORE CONDENSED BY

THOMAS SERGEANT AND JOHN C. LOWBER, Esqrs.,

Now Reprinted in full.

VOL. LXII.

CONTAINING

THE CASES IN THE COURT OF COMMON PLEAS, IN HILARY, EASTER, AND
TRINITY TERMS AND VACATIONS, 1849.

PHILADELPHIA:

T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,

NO. 535 CHESTNUT STREET.

1865.

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COMMON BENCH REPORTS.

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IN

THE COURT OF COMMON PLEAS,

IN

HILARY, EASTER, AND TRINITY TERMS AND VACATIONS, 1849.

WITH TABLES OF THE NAMES OF CASES ARGUED AND CITED
AND OF THE PRINCIPAL MATTERS.

BY

JAMES MANNING,

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OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

VOL. VII.

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J U D G E S
OF THE
COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir THOMAS WILDE, Knt., Id. Ch. J

The Hon. Sir WILLIAM HENRY MAULE, Knt.

The Hon. Sir CRESSWELL CRESSWELL, Knt.

The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt

The Hon. Sir THOMAS NOON TALFOURD, Knt.

ATTORNEY-GENERAL.

Sir JOHN JERVIS, Knt.

SOLICITOR-GENERAL.

Sir JOHN ROMILLY, Knt.

A T A B L E

OF

THE NAMES OF THE CASES

REPORTED IN THIS VOLUME.

A.		PAGE	C.		PAGE
Anderson, Smyth v. . . .		21	Capper, Beswick v. . . .		669
			Cardigan (Earl), Doe d., v. Bywater		794
	B.		Carlisle (Bishop), Tolson v. . .		79
			Cattlin, In re		136
Baker v. Coghlan		131	Caunt v. Thompson		400
Barber v. Thomas		612	Chadwick, Morrison v. . . .		266
Bardell v. Miller		753	Challis, Edmonds v. . . .		413
Bather v. Brayne		815	Chaplin, Newton v. . . .		774
Bayley v. Wilkins		886	Chippendale, Doe d., v. Roe . .		125
Bennett, Doe d., v. Roe . .		127	City Steamboat Company, Woolf v.		103
Beswick v. Capper		669	Clossman v. White		43
Bevan, Wilson v. . . .		673	Coghlan, Baker v. . . .		131
Bevis, Doe d. Kinglake v. .		456	Coleman v. Biedman		871
Biedman, Coleman v. . . .		871	Collinge, Doe d. Brammall v. .		939
Blurton, Lewis v. . . .		102	Cooper v. Pennefather		739
Boxer, Jones v. . . .		58	Copper Miners' Company, Wood v.		906
Bradbury, Powell v. . . .		201	Crossfield v. Morrison		286
Brammall, Doe d., v. Collinge		939	Cunliff v. Maltass		695
Brayne, Bather v. . . .		815		D.	
Burgess, Gell v. . . .		16			
Butler v. Fox		970			
— v. Frost		969	Dalton, Ward v. . . .		644
Bywater, Doe d. Cardigan (Earl) v.		794	Dearie v. Henderson		71

	PAGE		PAGE
Delafield, Webster v. . . .	187	Harris, Wild v. . . .	599
Delany, Follett v. . . .	775	Haslam, Hudson v. . . .	825, 833
Dickson, Hoare v. . . .	164	Healey, Wakley v. . . .	591
Dixon, Doe d., v. Roe . . .	134	Hemming, Doe d., v. Willetts . . .	709
Dobson, Sanderson v. . . .	81	Henderson, Dearie v. . . .	71
Dodd v. Wigley	106	Hennet, Turquand v. . . .	179
Doe d. Bennett v. Roe . . .	127	Herrick, Mayhew v. . . .	229
— d. Brammall v. Collinge . . .	939	Higgs v. Scott	63
— d. Cardigan (Earl) v. Bywater . . .	794	Hill v. Kempshall	975
— d. Chippendale v. Roe . . .	125	Hitchings, Tate v. . . .	875
— d. Dixon v. Roe	134	Hoare v. Dickson	164
— d. Hemming v. Willetts . . .	709	Hudson v. Haslam	825, 833
— d. Kinglake v. Beviss . . .	456	Humfrey v. Gery	567
Dunsany (Baroness), In re . . .	119		
		J.	
E.		Johnson, Shackel v. . . .	865
Edmonds v. Challis	413	— v. Ward	868
Ellis, Surridge v. . . .	1006	Jones v. Boxer	58
Ensor v. Griffin	781		
Ewbank v. Nutting	797	K.	
		Kempshall, Hill v. . . .	975
F.		Kempton, Fish v. . . .	687
Farmer, Timothy v. . . .	814	Kenrick, Smith v. . . .	515
Ferguson, Sainter v. . . .	716	Kinglake, Doe d., v. Beviss . . .	456
Fish v. Kempton	687	Kinnersley v. Knott	980
Follett v. Delany	775	Knott, Kinnersley v. . . .	980
Foster, Ex parte	120	Knowles, Tempson v. . . .	651
Fox, Butler v. . . .	970		
Francis v. Webb	731	L.	
Frost, Butler v. . . .	969	Leader v. Purday	4
		Lee v. Lester	1008
G.		Lester, Lee v. . . .	1008
Gandell, Ross v. . . .	766	Lewis v. Blurton	102
Gannon, Sargent v. . . .	742	Lewis, Towne v. . . .	608
Gell v. Burgess	16	London, Brighton, and South Coast	
Gery, Humfrey v. . . .	567	Railway Company, Richards v. . . .	839
Gilbert, Griffin v. . . .	101	—, Smith v. . . .	782
Gravesend (Mayor, &c.), Rolt v. . . .	777		
Gray, Ramsden v. . . .	961	M.	
Griffin, Ensor v. . . .	781	M'Lean v. Phillips	817
— v. Gilbert	101	Maltass, Cunliffe v. . . .	695
		Mathews v. Mathews	1018
H.		Mayhew v. Herrick	229
Hall, Murray v. . . .	441	Memoranda	607
Hamber v Roberts	861		

	PAGE		PAGE
Meniaeff v. Reade	139, 152	S	
Meryweather, Turner v.	251	Sainter v. Ferguson	716
Miller, Bardell v.	753	Sanderson v. Dobson	81
— v. Shuttleworth	105	Sargent v. Gannon	742
Morrison v. Chadwick	266	Schröder, Lord Newborough v.	342
— , Crossfield v.	286	Scott, Higgs v.	63
Murray v. Hall	441	Shackel v. Johnson	865
		Sheils v. Rait	116
N.		Shingler, Tarleton v.	812
Newborough (Lord) v. Schröder	342	Shrubsole, Reed v.	630
Newman, Woodhams v.	654	Shuttleworth, Miller v. . . .	105
Newton v. Chaplin	774	Smallcombe v. Williams . . .	77
Nicholson, Winn v.	819	Smart, Pritchett v.	625
Nutting, Ewbank v.	797	Smith v. Kenrick	515
		— v. London, Brighton, and South	
		Coast Railway Company . . .	782
		— v. Troup	757
P.		Smyth v. Anderson	21
Pennefather, Cooper v.	739	Southampton and Dorchester Rail-	
Pennell v. Stephens	987	way Company, Pilgrim v. . . .	205
Phillips, M'Lean v.	817	Stephens, Pennell v.	987
Pilgrim v. The Southampton and		Surridge v. Ellis	1006
Dorchester Railway Company	205		
Powell v. Bradbury	201	T.	
Pritchett v. Smart	625	Tarleton v. Shingler	812
Promotions	607	Tate v. Hitchings	875
Purday, Leader v.	4	Taylor, Ex parte	1
		Tempson v. Knowles	651
R.		Thomas, Barber v.	612
Raincock, Young v.	310	Thompson, Caunt v.	400
Rait, Sheils v.	116	Timothy v. Farmer	814
Ramsden v. Gray	961	Tolson v. Carlisle (Bishop)	79
Reade v. Meniaeff	139, 152	Towne v. Lewis	608
Reed v. Shrubsole	630	Troup, Smith v.	757
Richards v. London, Brighton, and		Turner v. Meryweather . . .	251
South Coast Railway Company	839	Turquand v. Hennet	179
Roberts, Hamber v.	861	W.	
Roe, Doe d. Bennet v.	127	Wakley v. Healey	591
— , Doe d. Chippendale v. . . .	125	Ward v. Dalton	643
— , Doe d. Dixon v.	134	— , Johnson v.	868
Rolt v. Gravesend (Mayor, &c.)	777	Webb, Francis v.	731
Ross v. Gandell	766	Webster v. Delafield	187

TABLE OF CASES.

	PAGE		PAGE
White, Cloesman v. . . .	43	Wood v. Copper Miners' Company	906
Wigley, Dodd v. . . .	106	Woodhams v. Newman . . .	654
Wild v. Harris	999	Woolf v. The City Steamboat Com-	
Wilkins, Bayley v. . . .	886	pany	103
Willetts, Doe d. Hemming v. .	709		
Williams, Smallcombe v. . .	77	Y.	.
Wilson v. Bevan	673		
Winn v. Nicholson	819	Young v. Raincock . . .	310

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
IN
Hilary Term,

IN THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

Gillaspie

The judges who usually sat *in banco* in this term were—

WILDE, C. J.

CRESSWELL, J.

MAULE, J.

V. WILLIAMS, J.

Ex parte ELIZABETH TAYLOR. Jan. 11.

The court will not grant a rule to enable a married woman to execute a conveyance without her husband's concurrence, under the 3 & 4 W. 4, c. 74, s. 91, upon a mere statement that the husband, a seaman, has gone abroad, and has not been heard of for some years, and that the wife has been informed that he is dead. The affidavit must show some reasonable ground for presuming the statement to be true.

BYLES, Serjt., moved for a rule, under the 3 & 4 W. 4, c. 74, s. 91, to enable Mrs. Elizabeth Taylor to convey her interest in certain property, to which she claimed to be separately entitled under the will of one Andrew Witham, deceased, without the concurrence of her husband.

*The affidavit upon which the motion was founded, stated that the deponent (Mrs. Taylor) was married to one Archibald Taylor, on [2 the 9th of July, 1843; that Taylor, who was a seaman, in March, 1845, left England for Honduras, on board a ship called the Demerara Packet; that since he left England, she had only twice heard from him,—the last time being within twelve months after his departure; that the deponent had been informed that her said husband died in the early part of 1847, of the yellow fever, whilst employed on board a boat in Notts Bay, in the island of Jamaica, and that his body was thrown overboard, but that the deponent was unable to prove his death; that she had never heard,

or had any tidings of or from her said *late* husband, since the time when she so heard of his death as aforesaid; that she was unable positively to state whether he was still alive or not, but that, if he was still living, she did not know, nor had she any means of ascertaining, where he was then residing. [WILDE, C. J. The deponent does not state from whom she received the information about her husband's death in Notta Bay, or that she believes it to be true: nor does it appear that any inquiry has been made of the owners of the ship in which he sailed.] To bring the case within the clause in question, it is not necessary to show the husband dead. It is enough if it appear that his residence is not known. [WILDE, C. J. The same may be said in the case of every man who goes to sea. MATIE, J. The affidavit does not show *when* the information of the husband's death was received by the deponent: it may have been only yesterday.]

WILDE, C. J. The affidavit is much too loose to warrant the court in granting a rule. You may renew your application upon better materials,—showing when, and from whom, the information of the husband's *3] death was received, and the deponent must allege her belief of its truth. The fact may be ascertained with reasonable certainty, by addressing an inquiry to the owners of the ship.

Byles, on a subsequent day, renewed his motion, upon a further affidavit of Mrs. Taylor, stating that one Harrison, a seaman, who left England on board the Demarara Packet with her husband, called upon her in the month of April, 1847, and informed her that he had just returned from Notta Bay, and that her husband had died there of the yellow fever about a month before he (Harrison) left that place, and that his body was thrown overboard; that Harrison on that occasion gave the deponent certain articles which had belonged to Taylor at the time of his death; that, when her husband left England, she received from him what is called a "half-pay ticket;" that she accordingly obtained from the owner of the ship the half of her husband's pay for the second month after his departure; but that, when she applied for the third month's half-pay, she was informed that Taylor had deserted. There was also an affidavit showing inquiries made of the owner of the Demarara Packet, the answers to which tended to confirm the probability of Taylor's death.

Per curiam. Enough has now been done to justify the Court in granting a rule. *Fiat.*

*4] *LEADER and COCK v. PURDAY. Jan. 11.

One who adapts words to an old air, and procures a friend to compose an accompaniment thereto, acquires a copyright in both words and accompaniment; and his assignee, in declaring for an infringement, may describe himself as proprietor of the copyright in the whole composition. In an action by A., for the infringement of copyright in a musical composition, consisting of an "air," which was old and not the subject of copyright, of "words," which were written by B.,

and an "accompaniment," which was composed by C., at the request and for the benefit of B.: Held, that it was not competent to the defendant,—under a notice of objections stating merely that A. was not the owner of the copyright, and that there was no subsisting copyright in the work,—to object at the trial that there had been no assignment by C., even though the point arose upon the evidence produced on the part of the plaintiff.

A. the author of a musical composition, in October, 1844, agreed in writing, not under seal, with B., for the sale of the copyright therein to him, undertaking to execute, when called upon, a proper assignment to B., his executors, &c., or as he or they should direct:—Held, that this did not operate as an assignment to B., so as to render inoperative a subsequent regular assignment by A. to B. and C.

THIS was an action upon the case for an infringement of the plaintiffs' copyright in a musical composition.

The declaration stated that there was a subsisting copyright in a certain book, to wit, a musical composition called "Pestal," and that the plaintiffs were proprietors of such copyright, and had printed and published for sale, and had sold, divers copies, &c.; that the defendant, after the passing of a certain act passed in a session of parliament holden in the fifth and sixth years of the reign of Her present Majesty, intituled, "An act to amend the law of copyright," knowingly, and without the consent of the plaintiffs, so being the proprietors of such copyright of and in such book, first had and obtained in writing, in a certain part of the British dominions, to wit, Great Britain, printed and caused to be printed and published for sale divers copies of the said book, in which there was such subsisting copyright, and of which the plaintiffs were such proprietors as *aforesaid*, contrary to the form [*5 of the statute in such case made and provided, &c.

The defendant pleaded,—first, not guilty,—secondly, that there was not any subsisting copyright in the said book, or any part thereof,—thirdly, that the plaintiffs were not the proprietors of the alleged copyright.

The defendant had given the following notice, under the 5 & 6 Vict. c. 45, s. 16,(a) of the objections on which he intended to rely:—"First,

(a) Which enacts, "that, after the passing of this act, in any action brought within the British dominions against any person for printing any such book for sale, hire, or exportation, or for importing, selling, publishing, or exposing to sale or hire, or causing to be imported, sold, published, or exposed to sale or hire, any such book, the defendant, on pleading thereto, shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of such action; and, if the nature of his defence be, that the plaintiff was not the author or first publisher of the book in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person who alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when and the place where such book was first published; otherwise the defendant in such action shall not, at the trial or hearing of such action, be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such copyright as *aforesaid*, or that he was not the proprietor of the copyright therein: and, at such trial or hearing, no other objection shall be allowed to be made on behalf of such defendant, than the objections stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person specified in such notice, or give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication with the title, time, and place specified in such notice."

that the plaintiffs were not the first publishers of the work in question : secondly, that they were not the owners of the copyright : thirdly, that there was no subsisting copyright in the musical publication : fourthly, *6] that the air was not composed by *Pestal, but was published by the plaintiffs fraudulently in his name, in order to deceive the public."

The cause was tried before CRESSWELL, J., at the first sitting in London, in Michaelmas term, 1847.

It was conceded that the air of Pestal was old, and not the subject of copyright, having already been published as well in England as abroad. It was proved, that, some time prior to the year 1844, a gentleman named Bellamy wrote certain words adapted to the air, and got a friend of his (Mr. C. E. Horne) to compose an "accompaniment;" that, on the 24th of October, 1844, Bellamy entered into an agreement in writing with Leader, whereby,—reciting a sale of the copyright in the production to Leader,—he undertook to execute a proper assignment of his aforesaid copyright and interest therein to Leader, his executors, &c., or as he or they should direct; that, in pursuance of this agreement, Bellamy afterwards, on the 11th of May, 1847, executed a regular assignment by deed, of the copyright to the plaintiffs; and that the plaintiffs, in May, 1845, published the air, with the words and accompaniment, and a short statement on the title page, ascribing the composition of the air to one Colonel Pestal, an officer in the Russian army, while under sentence of death for a political offence, and shortly before his execution.

The defendant also published the air with words and an accompaniment, and with a title-page closely resembling that of the plaintiffs' publication, and containing the same statement as to the authorship of the original air.

The alleged piracy was in the "accompaniment" only. Two musical professors of eminence, Dr. Calcott and Mr. Masters, who were called on the part of the plaintiffs, thought the accompaniment published by the defendant was an infringement of that of the plaintiffs, assigning as one of their reasons for coming to that conclusion, that they found *7] the same musical errors in *both: they both, however, admitted that the laws of harmony would require the composers of both to use pretty much the same notes.

For the defendant, the master of the military band at Woolwich was called, who stated that the air of Pestal had been played by the band there for many years, and that, in his judgment, the two accompaniments were totally different. The defendant also called one Grantham, who composed the accompaniment for him, and who swore that he had never seen or heard the plaintiffs' accompaniment. The person who composed the defendant's words likewise deposed that he had never seen the plaintiffs' words at the time he wrote for the defendant.

The defendant then called one Glover, who said that, in the year

1842, he had given a copy of the original air to one Jefferies; and Jefferies was called to prove that he had written a third set of words. This evidence was objected to, on the part of the plaintiffs, on the ground that the name of Jefferies was not disclosed in the defendant's notice of objections; and the learned Judge rejected it.

On the part of the defendant, it was objected, that the plaintiff's claim should have been limited to copyright in the *accompaniment*; and that, inasmuch as it appeared that there were two publications of Pestal, one of which could not be the subject of copyright, the plaintiffs should have new-assigned: and, further, that there was no proof of any assignment of the accompaniment by Horne, who composed it, to the plaintiffs; and that, Bellamy having already parted with his interest in the copyright to Leader, by the agreement of the 24th of October, 1844, there was no interest remaining in him upon which the assignment to the plaintiffs, of the 11th of May, 1847, could operate.

The learned judge left it to the jury to say whether *they [*8 thought the resemblance between the two accompaniments was designed, or was merely accidental, and such as would necessarily arise from an observance of the laws of harmony.

The jury were of opinion that the similarity of the defendant's accompaniment to that first published by the plaintiffs, was not accidental, but designed; and they accordingly returned a verdict for the plaintiffs, with nominal damages.

Byles, Serjt., in Michaelmas term, 1847, pursuant to leave reserved to him at the trial, moved for a rule to show cause why a nonsuit should not be entered, or a verdict for the defendant; or why there should not be a new trial on the ground of the improper exclusion of evidence, and that the verdict was not warranted by the evidence. This declaration is framed upon the 5 & 6 Vict. c. 45, the 2d section of which, amongst other things, enacts that the word "book" shall be construed to mean and include a "sheet of music." The publication in question consisted of a title-page, an air,—which was admitted to be *publici juris*,—words, as to which no question arose, and an accompaniment. The plaintiffs, therefore, claimed too much, when they claimed copyright "in a certain book, to wit, a musical composition called Pestal:" and, inasmuch as it appeared that there was a production bearing that name, which could not be the subject of copyright, the plaintiffs should have new-assigned. [MAULE, J. There was no justification.] There was a traverse of the subsistence of copyright in Pestal. [MAULE, J. Can there be a new-assignment after a negative plea?] Suppose the defendant had pleaded to this effect, that Pestal is a musical composition in which there is no subsisting copyright, and this he is ready to verify. [MAULE, J. The defendant *affirms* nothing. COLTMAN, J., *re- [*9 ferred to *Barnes v. Hunt*, 11 East, 451.] *Barnes v. Hunt* is no longer law: it is now clearly settled, that, upon a plea of leave and

license, in trespass, the plaintiff *must* new-assign. [V. WILLIAMS, J. The whole doctrine of new-assignment rests upon that case.] Suppose the defendant in this case had pleaded leave and license,—would not the plea have been sustained by proof of leave and license to publish Pestal in its original shape? This is a clear misdescription. Then, the plaintiffs proved that their accompaniment was composed by Mr. Horne: but they showed no assignment of the copyright from Horne. [WILDE, C. J. Horne was employed to compose it for Bellamy.] That does not make the product of the composer's brain the property of the employer.(a) The plaintiffs put in an agreement by Bellamy to assign to Leader, dated the 24th of October, 1844: they then put in a deed of the 11th of May, 1847, purporting that Bellamy assigned the same copyright to Leader and Cocks. If the agreement of the 24th of October, 1844, operated as a legal and valid assignment from Bellamy to Leader, Bellamy would have nothing that he could convey to Leader and Cocks by the deed of the 11th of May, 1847;(b) and, if so, there is a clear ground of nonsuit. The evidence of Jefferies was improperly rejected. [WILDE, C. J. Was it material evidence in the cause? MAULE, J. The words had already been given up.]

A rule nisi having been granted,

*10] *Talfourd*, Serjt., and *Petersdorff*, now showed cause. *One main object of the recent statute was to prevent questions of this sort from being raised by a mere wrongdoer. When Mr. Bellamy first conceived the notion of adapting the air of “Pestal” to words of his own composing, and of adding an accompaniment, he acquired to himself that which unquestionably might be the subject of copyright, and susceptible of assignment under the 13th section of the 5 & 6 Vict. c. 45.(c) The first question is, whether the plaintiffs succeeded in showing that this was such a publication as came within the description in the declaration. The objection was, that the *whole* publication was not the property either of Bellamy or of the plaintiffs. That the plaintiffs never pretended. All they say is, that Bellamy had a clear and undoubted right to the

(a) But see *Wyatt v. Barnard*, 3 Ves. & B. 77. As to the employment by patentees, of others, to give practical effect to their inventions, vide *Allen v. Rawson*, 1 Man. Gr. & S. 551. And see *Bloxham v. Elsee*, 1 C. & P. 567, and *Minter v. Wells*, 1 Webster's Patent Cases, 132.

(b) See *Power v. Walker*, 3 M. & S. 7, 4 Campb. 8; *De Pinna v. Polhill*, 8 C. & P. 78.

(c) Which enacts, “that, after the passing of this act, it shall be lawful for the proprietor of copyright in any book heretofore published, or in any book hereafter to be published, to make entry in the registry book of the Stationers' Company, of the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the said book, or of any portion of such copyright, in the form in that behalf given in the schedule to this act annexed, upon payment of the sum of 5s. to the officer of the said Company; and that it shall be lawful for every such registered proprietor to assign his interest, or any portion of his interest, therein, by making entry in the said book of registry, of such assignment, and of the name and place of abode of the assignee thereof, in the form given in that behalf in the said schedule, on payment of the like sum; and such assignment, so entered, shall be effectual in law, to all intents and purposes, without being subject to any stamp or duty, and shall be of the same force and effect as if such assignment had been made by deed.”

words and the accompaniment, which he conveyed to them. Pestal had never been published as a song. Bellamy was the author of the words, and the accompaniment was composed at his suggestion, and for his benefit, by his friend Horne. Both, therefore, became his property. To justify a claim of copyright, it is not necessary that there should be entire originality in every part of the work: if it were *so, there could be no copyright in Pope's Iliad, Dryden's Virgil, Williams's [11 Saunders, Hargrave and Butler's Co. Litt., and many other works similarly circumstanced. In declaring for an infringement of a patent right, where the claim is of a combination only, the declaration never need specify the particular parts of the machine or manufacture of which the plaintiff alleges himself to be the inventor: the plaintiff may claim generally. Besides, under the notice of objections here delivered, it was not open to the defendant to set up the authorship of Horne. In *Boosey v. Davidson*, 4 D. & L. 147, it was expressly held, that the defendant is bound, in his notice of objections, to state the *name* of the party whom he alleges to be the proprietor or first publisher, the title of the work, the place where, and the time when, the first publication took place. The agreement between Bellamy and Leader, of the 24th of October, 1844, was a mere executory agreement: it did not purport to be, nor did it operate as, an assignment of the copyright. The title of the plaintiffs arises wholly under the deed of the 11th of May, 1847. Copyright cannot be assigned by parol: the recent statute, as well as the 8 Ann. c. 19, evidently contemplate that the assignment must be by deed. [COLTMAN, J. Would copyright pass, even by deed, independently of the statute?] It is submitted that it would.

Couch, in support of the rule. The only portions of the publication in question that were new, were, the words and the accompaniment. Assuming Bellamy's title to have been well conveyed to the plaintiffs, that did not justify them in claiming in their declaration the entire work; they should have limited their claim to the words and the accompaniment. The instance put on the other side, of Hargrave & Butler's *Coke-upon-Littleton, is hardly analogous: in declaring for the piracy of a note of Mr. Hargrave's, the plaintiff certainly would [12 not describe himself as the proprietor of the copyright of Coke-upon-Littleton,—which is what the plaintiffs have in effect done here. The other instance of Williams's Saunders is equally inapplicable. [V. WILLIAMS, J. The text there was a translation from the old French.(a)] The provision in s. 18 of the 5 & 6 Vict. c. 45,(b) as to encyclopædias

(a) See *Wyatt v. Barnard*, 3 Ves. & B. 77.

(b) Which enacts, "that, when any publisher or other person shall, before or at the time of the passing of this act, have projected, conducted, and carried on, or shall hereafter project, conduct, or carry on, or be the proprietor of, any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed, or shall employ, any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles; or portions shall have been or shall hereafter be composed under such employment, on the terms

*13] and serial *works, shows, that, in this case, there should have been an assignment from Horne, to make the title perfect. [MAULE, J. The 18th section contemplates the case of a publisher employing an author to write an article for an encyclopædia or other serial or periodical work, for a consideration, and not a case like this, where the suggested task is done through friendship only. This was never intended to form a portion of a work.] There was nothing to prevent Horne from giving the accompaniment to any one else, or from publishing it himself. But it is said that the defendant was not at liberty to urge this objection, because his notice of objections did not give the name of Horne as the author or proprietor. The objection, however, arises, not by way of defence, but upon the plaintiffs' own case. It is a matter that is exclusively within their knowledge: whereas, the object of the 13th section of the statute, was, to give the plaintiff information only of that of which he was ignorant. [MAULE, J. It does not appear that the plaintiffs knew any more about Horne than the defendant did.] The plaintiffs were more likely to be informed as to the title of the party from whom they took the assignment, than the defendant was. Besides, their own title-page stated that the music was "arranged by C. E. Horne." [MAULE, J. The plaintiffs did not provide themselves with evidence of Horne's title, because the defendant's notice of objections gave them no intimation that Horne's title would come in question. If the plaintiffs *had* incurred the expense of proving Horne's title, the defendant would, upon the taxation of costs, *14] have *objected before the master, and with reason, that the expense of that proof ought not, under the circumstances, to be allowed.] The statute never could have intended that the want of a formal notice should prevent the defendant from availing himself of matters appearing upon *the plaintiff's case*. Then, as to the assignment,—Bellamy having already, by the agreement of the 24th of October, 1844, divested himself of all his interest in the copyright to Leader, there was nothing upon

that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor,—the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same right as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this act; except only, that, in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this act: Provided always, that, during the term of twenty-eight years, the said proprietor, projector, publisher, or conductor, shall not publish any such essay, article, or portion separately or singly, without the consent, previously obtained, of the author thereof, or his assigns: Provided also that nothing herein contained shall alter or affect the right of any person who shall have been, or who shall be, so employed as aforesaid, to publish any such his composition in a separate form, who, by any contract, express or implied, may have reserved, or may hereafter reserve, to himself such right; but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition when published in a separate form, according to this act, without prejudice to the right of such proprietor, projector, publisher, or conductor, as aforesaid."

which the assignment of the 11th of May, 1847, could operate. [COLTMAN, J. Has it not been held that an assignment of copyright must be by *deed*?] It must, it seems, be *in writing*—*Power v. Walker*, 3 M. & S. 7, 4 Camp. 8: But, though an intimation of opinion to that effect was thrown out by TINDAL, C. J., in *De Pinna v. Polhill*, 8 C. & P. 78, it has never been distinctly decided that the assignment must be *by deed*. [MAULE, J. Bellamy does not profess to assign the copyright by the agreement of the 24th of October, 1844.] It has repeatedly been held, that an agreement operates as a present demise, even where every line of the document points evidently to the execution of a more perfect and formal contract.

COLTMAN, J. It appears to me that there is no ground for granting a new trial in this case. The first question is, whether the plaintiffs were entitled to claim copyright in the whole “book,”—a musical composition, consisting of an “air,” in which no person claimed copyright, certain words and prefatory matter, of which one Bellamy (under whom the plaintiffs claimed) was the author, and an “accompaniment,” which Bellamy procured a friend to compose for him. It is said, that, as the “air” was not the plaintiffs’ property, the declaration improperly claimed the whole combination. It appears to me, however, that no difficulty of that sort arises here. This is very like the common case of improvements in a machine, where the patent is taken out for an improved machine.^(a)

It was further objected, that the plaintiffs should have shown an assignment of the “accompaniment,” by Horne to Bellamy. But I think it was not competent to the defendant, under the notice of objections which he gave, to raise that point. The words of the 16th section are express, that the defendant shall not at the trial be allowed to give evidence that the plaintiff was not the author or proprietor of the copyright, unless his notice shall specify the name of the person whom he alleges to be so.

As to the only remaining question, it seems to me that it was quite competent to the parties to enter into an executory contract for a future formal assignment of the copyright; and that these parties had clearly and unequivocally entered into such a contract.

I therefore think the rule must be discharged.

MAULE, J. I am of the same opinion upon all the points.

CRESWELL, J., expressed no opinion.

V. WILLIAMS, J. I also am of opinion that this rule ought to be discharged. As to the first point, that the invasion is of the “accompaniment” only, that resolves itself into a question of pleading. If the subject-matter of the copyright is properly described in the declaration, the plaintiffs clearly have a right of action in respect of its infringement: and it seems to me that it is properly described. Rule discharged.

(a) But, in that case, the specification distinguishes between that which is old and that which is new.

*16]

*GELL v. BURGESS. Jan. 13.

A declaration in debt contained three counts,—the first on a bill of exchange, the second for money lent, and the third upon an account stated; concluding, to the plaintiff's damage of 10*l.*, &c.

The defendant pleaded,—first, as to 10*s.*, parcel of the moneys in the first and last counts (averring identity), payment and acceptance in satisfaction before action brought;—secondly, as to the residue of the first and last counts, payment and acceptance, after action brought, of 50*l.*, in satisfaction and discharge “of the causes of action in the introductory part of the plea mentioned;”—thirdly, to the second count, never indebted:—

Held, that the second plea sufficiently answered the damages for the detention of the moneys mentioned in the first and third counts.

THIS was an action of debt. The first count of the declaration charged the defendant as the acceptor of a bill of exchange drawn by the plaintiff, payable to his own order; the second was for money lent; and the third, for money due upon an account stated,—concluding, “to the plaintiff's damage of 10*l.*, and therefore he brings his suit, &c.”

The defendant,—who was under terms to plead issuably,—pleaded, first, “as to the sum of 10*s.*, parcel of the moneys in the said first count of the declaration mentioned, and also the sum of 10*s.*, parcel of the moneys in the last count of the declaration mentioned, that the said account in the said last count mentioned, so far as the same relates to the said sum of 10*s.*, parcel, &c., in the said last count mentioned, was had and stated of and concerning the said sum of 10*s.*, parcel, &c., in the said first count mentioned, and not otherwise; and that the said sum of 10*s.*, parcel, &c., in the said first count mentioned, is one and the same, and not other than, or different from, the sum of 10*s.*, parcel, &c., in the said last count mentioned: and the defendant further says, that, after the accruing of the causes of action in the declaration mentioned, so far as the same relate to the said sums of money in the introductory part of this plea mentioned, and before the commencement of

*17] this suit, to wit, on, &c., he the *defendant paid to the plaintiff, who then accepted and received of and from the defendant, a large sum of money, to wit, 10*s.*, in full satisfaction and discharge of the said sums of money in the introductory part of this plea mentioned;” verification.

Secondly, “for a further plea in this behalf, as to the residue of the said first and last counts, *actio inde ulterius non*, because he, the defendant, after the commencement of this suit, to wit, on, &c., paid to the plaintiff, who then accepted and received of and from the defendant, a large sum of money, to wit, 50*l.*, in full satisfaction and discharge of the causes of action in the introductory part of this plea mentioned; and this he the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his aforesaid action thereof against him.”(a)

(a) Vide 2 Lutw. 1177; 1 Com. Rep. 318; 4 East, 502; R. T. 1 Vict. reg. 1; Thompson & Jackson, 1 M. & G. 242, 1 Scott, N. R. 157.

Thirdly,—to the second count,—*nunquam indebitatus*.

The plaintiff signed judgment for damages on the first and last counts,—contending that the second plea professed to answer the *debt* only, and not the damages.

MAULE, J., having made an order for setting aside this judgment for irregularity,

A. W. *Hoggins* moved to set aside the order. The second plea is pleaded only “as to the residue of the said first and last counts:” it professes, therefore, to answer only the *debt* in each of those counts, and not the *damages* for its detention; which, according to *Lowe v. Steele*, 15 M. & W. 380, it ought to have done. *Henry v. Earl*, 8 M. & W. 228, 9 Dowl. P. C. 725, is also an authority to show that a plea of payment, in debt, pleaded to the “causes of action in the *declaration mentioned,” is not an answer to the damages; and that the plain- [*18
tiff may sign judgment for any damages which are not answered by the plea. In *Triston v. Barrington*, 16 M. & W. 61, the plea was a plea of payment of a sum of money in satisfaction of all the causes of action in the declaration mentioned,—and it was held to be an answer as well to the damages as to the debt. [V. WILLIAMS, J. Is there no plea covering the whole declaration?] No. The damages are not covered by any plea: *Lumley v. Musgrave*, 4 N. C. 9, 5 Scott, 230. [WILDE, C. J. Is not the damage at the end to be read in each count? Suppose there had been only one count? MAULE, J. The *count*, properly speaking, is the whole declaration, from beginning to end, whether there be but one count, or several counts, popularly so called.] Where the plea acknowledges the cause of action, it should answer the damages as well as the debt: it may be otherwise where the cause of action is *denied*. [WILDE, C. J. I think it is quite clear that the plaintiff had no right to take upon himself to sign judgment.] In *Wheeler v. Senior*, 9 Dowl. P. C. 270, 7 M. & W. 562, a count in assumpsit stated that the plaintiff made his bill of exchange, which the defendant accepted, and that, before the bill became due, the plaintiff had parted with the possession thereof; and thereupon, in consideration that the plaintiff would again procure possession of the bill, and prevent the same from being presented for payment, the defendant promised that he would remit the plaintiff the amount (728*l.* 6*s.*) on a certain day: the count then averred performance by the plaintiff, and a breach by the defendant. The latter pleaded, as to 609*l.* 10*s.*, parcel of the said sum of money, that the defendant paid to the plaintiff 700*l.*, in satisfaction of the sum of 609*l.* 10*s.*, parcel of certain moneys specified in a bill of exchange, dated, &c., which *was the same identical bill as that declared on. A [*19
replication, denying that the bill mentioned in the plea was the same identical bill, and concluding with a verification, was held bad on special demurrer. But the Court also intimated an opinion that the plea was bad, for not alleging the money to have been paid in satisfaction of

damages. [CRESSWELL, J. Does the detention of the debt form part of any count?] Yes. [CRESSWELL, J. Then the plea does answer the detention of the debt. The plaintiff accepted the money in satisfaction of the detention.] *Corbett v. Swinburne*, 8 Ad. & E. 678, which shows that costs are included in the damages, serves to fortify this view. It would be a discontinuance to reply to this plea, if it does not answer the damages.

WILDE, C. J. It seems to me that this judgment was irregularly signed. The damages at the end of the declaration, must be supposed to attach to some complaint in some part of the declaration; otherwise there would be nothing to which it would be referable. The commencement of the declaration states that the plaintiff complains of the defendant,—who has been summoned to answer the plaintiff in an action of debt,—and that he demands of the defendant a certain sum, which the defendant owes to and unjustly detains from him. The count then proceeds to set forth the grounds of complaint, and concludes,—“which said several moneys were to be respectively paid by the defendant to the plaintiff on request; whereby, and by reason of the non-payment of the said several moneys respectively, making together the sum above demanded, an action hath accrued to the plaintiff to demand and have the same of and from the defendant; yet the defendant hath not paid the said *20] sum above demanded, or any part thereof; *to the plaintiff’s damage of 10*l.*, and thereupon he brings suit, &c.” To what are you to refer that damage? Why, clearly to the matters of complaint previously set forth. Suppose you were to sever the damages, and to apply them to each of the several causes of complaint,—the plaintiff would recover the several portions in reference to the matters charged in each count. The effect would be, to read into each count so much of the damages as are applicable to it. I therefore think this plea, which professes to answer the residue of the first and last counts, in truth answers all that substantially forms part of each of those counts, including the damages. The whole of the declaration should be read together. For these reasons, I think the judgment was improperly signed, and consequently that the order setting it aside was rightly made.

MAULE, J. Formerly, a count meant a declaration. Now, it means something that, standing alone, is a declaration. I think the “count,” properly speaking, includes the whole cause of action as well at the end as at the beginning of the declaration. The cases relied on are cases where the language of the plea excluded damages,—being pleaded to part of the money mentioned in a particular count. So, here, this plea would be bad, if considered as pleaded to a part of the cause of action in a single count.

The rest of the Court concurring,

Rule refused.

***SMYTH and Two Others v. ANDERSON. Jan. 18. [*21**

The right of the seller of goods to resort to an undisclosed foreign principal, is barred by any circumstance which shows that the enforcement of that right would operate unjustly.

A., as agent of B., a merchant residing abroad, bought goods of C. At the time of the purchase, A. did not inform C. who was his principal; but the invoices described the goods as "bought on account of B., per A." C. afterwards drew upon A. for the amount, at four and six months, but A. became insolvent before either of the bills arrived at maturity. B., after receiving advice of the purchase, and of the acceptance of the bills by A., made large remittances to A. on account of these and other goods; and A., at the time of his stoppage, was considerably indebted to B.:—

Held, that, under these circumstances, it was not competent to C. to sue B. for the price of the goods.

Held also, that the above defence was admissible under non assumpsit.

Held also, that the books of C. were not admissible for the purpose of showing that B. had been throughout debited by him as principal.

THIS was an action of assumpsit for goods sold and delivered, for money paid by the plaintiffs to the defendant's use, for work and labour and commission, and for money found due upon an account stated.

The defendant pleaded non assumpsit.

The cause was tried before WILDE, C. J., at the sittings in London, after Michaelmas term last. The facts that appeared in evidence were as follows:—

The plaintiffs, Smyth, Cowan, and Pender, carried on business as commission agents at Manchester, under the firm of John Pender & Co. Smyth and Cowan also carried on business as merchants at Glasgow, under the firm of Alexander Smyth & Co.

The action was brought to recover a sum of 1960*l.* 17*s.* 5*d.*, being the amount of goods alleged to have been sold by the plaintiffs to the defendant, who was a member of a mercantile firm at Bombay, trading under the name of Anderson & Co.

It appeared that, in July, 1847, Pender, one of the plaintiffs, called for orders upon a house of great credit in London, carrying on the business of merchants and *agents, under the firm of Melville & Co., [*22 and who had, for a long time, corresponded with Anderson & Co., of Bombay. Young, a clerk in the employ of Melville & Co., on that occasion gave Pender an order for the goods in question, telling him that they were for shipment to Bombay, pursuant to orders which the firm had received. Young, who was called as a witness, could not undertake to say that the names of Anderson & Co. were mentioned at the time. But it was conceded that the goods were, in fact, ordered for Anderson & Co., and that they were shipped to and received by them.

A few weeks after the order was so given, invoices were sent in duplicate from the Manchester house of John Pender & Co., to Melville & Co., in London, who, retaining one copy, forwarded the other to Anderson & Co.

The first two invoices, which were dated the 20th of August, 1847,

were headed as follows:—"Invoice of [40] cases goods bought and laying here to order, on account of Messrs. A. Anderson & Co., Bombay, *per* Messrs. Melville & Co., London, by John Pender & Co., agents." The third and fourth were respectively dated the 18th of September, 1847, and were headed as follows:—"Invoice of [6] cases goods bought and forwarded to Messrs. Leach, Harrison & Co., Liverpool, to be shipped *per* ———, on account and risk of Messrs. A. Anderson & Co., Bombay, *per* Melville & Co., London, by John Pender & Co., agents."

In payment for these goods, Smith & Co. drew two bills upon Melville & Co., one for 1286*l.* 19*s.*, dated the 25th of August, 1847, payable at six months; the other, for 646*l.* 16*s.* 6*d.*, dated the 21st of September, payable at four months,—the former being drawn for the price of the goods in the first two invoices, the latter for that of the goods in the third and fourth invoices.

*23] *The goods mentioned in the third invoice, were supplied by the Glasgow house: all the rest were furnished by the Manchester house. But the bills were drawn as above, for the convenience, and at the request, of Pender & Co.

In September, 1847, shortly after the goods had been shipped for Bombay, the defendant arrived in England. Some doubt arising as to whether a portion of the goods were in conformity with the order given to Pender, the matter was referred to the defendant, who had personal communications on the subject with the plaintiffs, both at Manchester and at Glasgow; and a memorandum in his handwriting was put in, which was the subject of discussions between the defendant and Smyth & Co. in the month of October, 1847, and which was relied upon by the plaintiffs as amounting to an admission that he was a party interested in the transaction, and as showing that Anderson was, at that time, known to the plaintiffs to be, and then acted as, the principal.

It appeared that Pender & Co. had on other occasions had dealings with Melville & Co.

Melville & Co. stopped payment on the 8th of November, 1847; and the two bills were subsequently dishonoured.

Upon the bill for 646*l.* 16*s.* 6*d.* becoming due, and being returned, letters were addressed to the defendant both by the Manchester house and the Glasgow house. To the demand of the latter, the defendant returned a peremptory denial of his liability: to the letter of the former, he replied, in substance, that, not knowing the state of the account between his firm and Melville & Co., he was not then prepared to take upon himself any of the liabilities of that house.

In order to show that the plaintiffs had intended from the beginning to debit Anderson & Co. with the goods, *as the known principal,
*24] and not Melville & Co., the plaintiffs' books, in which Anderson

& Co. were so charged, were offered in evidence. His lordship, however, declined to receive them.

It appeared upon the defendant's case that Melville & Co. had a *general* account with Anderson & Co., and also what they called a *shipping* account; that, upon the latter account, Anderson & Co. stood indebted to Melville & Co. in about 1800*l.*; but that, on the general account (which included the balance on the shipping account), Melville & Co. were, at the time of their stoppage, debtors to Anderson & Co. to the extent of 2400*l.*

There was no evidence of any payment by Anderson & Co. to Melville & Co., precisely applicable to these particular goods: but it appeared that, shortly after the shipment of the goods, Melville & Co. had sent to Anderson & Co. an account in which they debited them with the amount of the two bills, of which Anderson had notice; and that Anderson & Co. had since made remittances to Melville & Co. to an amount more than sufficient to cover those bills.

The date of credit upon the transaction in question, as "equated" between Melville & Co. and Anderson & Co., was the 11th of January, 1848.

In the course of his summing up, the lord chief justice addressed these remarks to the jury:—"You have been correctly told, that if a merchant sells goods to another, in ignorance that he buys as an agent, or, knowing that he is an agent, being uninformed as to the name of his principal, although the seller may, in the first instance, have adopted the actual buyer, yet, when he discovers for whom the goods were bought, he is at liberty to adopt the principal as his debtor, and charge him,—that is, provided the principal has not in the interim paid his agent. The seller cannot, upon *discovering the true character [*25 of the transaction, charge the principal, to whom he did not give credit in the first instance, to the prejudice of the principal with reference to the state of accounts between him and his agent. That may in this case relieve us from one view of the matter; because it seems now to be conceded, that, according to the state of the accounts between Melville & Co., and Anderson & Co., if the former are the creditors of the latter for these goods, they are overpaid,—having in their hands a balance due to Anderson & Co. of 2400*l.* This, therefore, is the case of a claim made upon the principal after he has paid his agent; which brings it back to the question—on whose credit the goods were originally sold." And he ultimately told them, that, if they were of opinion that the sale was originally made upon the credit of Melville & Co., and not on that of Anderson & Co., they ought to find for the defendant.

The jury returned a verdict for the defendant.

Shee, Serjt. (with whom was *Greenwood*), on a former day in this term, moved for a new trial, on the grounds of misdirection, that evi-

dence had been improperly rejected, and that the verdict was against evidence.

The lord chief justice,—assuming it to be quite clear, that at the time the contract for the sale of the goods was entered into, Anderson & Co. were not known to the sellers as the principals,—left it to the jury to say whether credit had been originally given to Melville & Co. or to Anderson & Co. [WILDE, C. J. I had in my mind the cases of *Pater-son v. Gandasequi*, 15 East, 62, *Addison v. Gandassequi*, 4 Taunt. 574, and *Thomson v. Davenport*, 9 B. & C. 78, 4 M. & R. 110, and endeavoured to steer by them.] The substance of the *ruling of the *26] learned judge was this—Anderson & Co. were unknown principals, at the time of the contract: becoming known afterwards, they would be liable for the price to the sellers, unless they had paid Melville & Co.; but, having paid Melville & Co., they were discharged.

It is undoubtedly true, that an undisclosed principal who has paid the agent, to whom the credit was originally given, may, under some circumstances, be protected. But the rule is subject to a large exception, which it was most important to advert to in this case, but which seems to have altogether escaped the attention of the lord chief justice. The principal may be charged, unless the state of accounts between him and the agent be such as to make it manifestly unfair and unjust that he should be charged. [MAULE, J. If the principal has not paid, or the state of accounts between him and his agent is such that no prejudice could accrue to him by being called upon to pay again, he is liable.] If Anderson & Co. had paid for the goods in the ordinary course, and not prematurely, the general rule stated by the lord chief justice would have been applicable. But a principal cannot relieve himself from liability to the seller, by a payment made by anticipation to his agent. [MAULE, J. The principal is supposed not to know with whom his agent contracts.] But he knows the *terms* on which he contracts, and, among them, the time of payment. [WILDE, C. J. Suppose the agent says he will not buy on his own responsibility, unless the money is first placed in his hands? There is nothing to prevent parties from so dealing.(a)] If the seller, knowing the principal at the time, elects to charge the agent, he cannot afterwards have recourse to the principal: *Pater-son v. Gandasequi*. Lord ELLENBOROUGH, in that case, says: “The *law *27] has been settled in a variety of cases, that an unknown principal, when discovered, is liable on the contracts which his agent makes for him: but that must be taken with some qualification; and a party may preclude himself from recovering over against the principal, by knowingly making the agent his debtor.” And BAYLEY, J., said: “I have generally understood that the seller may look to the principal when he discovers him, unless he has abandoned his right to resort to him. I agree, that, where the seller knows the principal at the time, and yet

elects to give credit to the agent, he must be taken to have abandoned such right, and cannot therefore afterwards charge the principal." In *Thomson v. Davenport*, at the time of making the contract, the party buying the goods represented that he was buying them on account of persons resident in Scotland, but did not mention their names, and the seller did not inquire who they were, but afterwards debited the party who selected the goods: it was held that the seller might nevertheless resort to the principals. Lord TENTERDEN there says: "I take it to be a general rule, that, if a person sells goods, supposing at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered, to the prejudice of the principal. On the other hand, if, at the time of the sale, the seller knows, not only that the person who is nominally dealing with him is not principal, but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, *dealing with him, and him alone, [28 then, according to the cases of *Addison v. Gandassequi* and *Pater-son v. Gandasequi*, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. The present is a middle case. At the time of the dealing for the goods, the plaintiffs were informed that M'Kune, who came to them to buy the goods, was dealing for another, that is, that he was an agent, but they were not informed *who* the principal was. They had not, therefore, at that time, the means of making their election. It is true that they might, perhaps, have obtained those means if they had made further inquiry; but they made no further inquiry. Not knowing who the principal really was, they had not the power at that instant of making their election. That being so, it seems to me that this middle case falls in substance and effect within the first proposition which I have mentioned,—the case of a person not known to be an agent; and not within the second, where the buyer is not merely known to be agent, but the name of his principal is also known. There may be another case, and that is, where a British merchant is buying for a foreigner. According to the universal understanding of merchants, and of all persons in trade, the credit is there considered to be given to the British buyer, and not to the foreigner." The distinction here relied on is laid down by Lord ELLENBOROUGH, in express terms, in *Kymer v. Suwercropp*, 1 Campb. 109, where it was held, that, if goods are bought by a broker, the principal is liable to the vendor, if called upon when payment becomes due; *although he has previously paid the price of the*

goods to the broker : Secus, if the day of payment is allowed to pass by *29] *without any demand being made upon the principal. In Smith on Contracts, p. 181, 182, speaking of the situation of an agent who contracts without naming his principal, the result of the three cases of *Paterson v. Gandasequi*, *Thomson v. Davenport*, and *Kymer v. Suwercropp*, is thus given:—"It is settled, that, in such a case, the other contracting party may, when he discovers the true state of the facts, elect to charge either him or his principal, whichever he may think most for his advantage; and that he may do the same where the agent, at the time of making the contract, says that he has a principal, but declines to say who that principal is. But there is this qualification to the right of election, viz. that if the state of accounts between the agent and principal have been altered, so that the principal would be subjected to a loss by the contracting parties' election, the right of election is in such case lost. Suppose, for instance, I employ A. to purchase goods, and he purchases them from B. in his own name. Now, B., when he discovers me to be the real principal, may elect whether he will treat me or my agent A. as his debtor. But, if, in the meantime, I have paid A., he will lose that right, since otherwise I should have to pay the price twice over. Still, this qualification is itself subject to a minor one, viz. *that the principal cannot, by prematurely settling with his agent, deprive the contracting party of his right of election.* Suppose, for instance, as in the case I have just put, that I employ A. to purchase goods, but not for ready money, but at three months' credit. A. purchases in his own name from B. B., before the three months have elapsed, discovers the true state of affairs, and elects to take me as his debtor. I should not be allowed to say, in this case, 'You are too late; I have settled with A., my agent.' The *answer would be—"You had no occasion (a) *30] to do so pending the time of credit; and you cannot, by doing so, deprive B. of his right to elect you as his debtor.'" The fair result of all the authorities, is, that the principal (unknown at the time of the contract, but discovered afterwards) is discharged by payment to the agent, only where such payment is made at the usual or stipulated time; and that he cannot relieve himself from responsibility by a premature or anticipated payment. [WILDE, C. J. That rule, at all events, cannot apply to foreigners, who must, as a matter of necessity, remit to their correspondents here before the maturity of the bills accepted on their account.] In *Paterson v. Gandasequi*, Lord ELLENBOROUGH refers to a MS. case of *Powel v. Nelson* (cited 15 East, 65), as one in which the liability of a principal was carried the furthest that he could remember. There, a factor made purchases for his principal, who made payments to him on account. Afterwards, the factor was pressed for payment, by a letter which came to the hands of the principal, who transmitted it to the factor, and with a knowledge of the fact *paid him the residue.* It

(a) i. e. 'You had no right, as against B.'

was held by Lord MANSFIELD, C. J., that the principal was liable over to the sellers *for the money he had so paid to his factor after notice*.

Then, was this defence open to the defendant under non assumpsit? [MAULE, J. It would be competent to the defendant, under non assumpsit, to show that the action is brought before the expiration of the stipulated credit.(a) The defence here is, that, before the credit expired, a state of things existed as between Anderson & Co. and Melville & Co., their agents, which took away the plaintiff's right to charge Anderson & Co. as the buyers of the goods.] Under non assumpsit, the only *question was, whether or not the defendant contracted. It is [*31 clear upon the facts that he did: for, the moment the name of an undisclosed principal becomes known, the contract of the agent is the contract of the principal. [CRESWELL, J. That may or may not be. MAULE, J. Nobody contracted on the terms of present payment. If, then, any circumstances prevented a liability from attaching upon the defendant before the expiration of the credit, they would be admissible under non assumpsit. A special plea setting out all the facts would clearly be demurrable.]

As to the rejection of evidence,—It had been insisted from the beginning, on behalf of the plaintiffs, that they had all along intended to look to Anderson & Co., knowing them to be the principals: and the plaintiff's books were offered in evidence, for the purpose of showing that Anderson & Co. were originally debited by them. For that purpose, it is submitted, that the books ought to have been received. In Addison v. Gandassequi, the seller's books were given in evidence. [MAULE, J. By whom?] That does not appear from the report. The books here were offered, not for the purpose of proving a fact against a person not informed of the entry, but simply to show that the plaintiffs did not at the time elect to abandon their remedy against the principals. [WILDE, C. J. Suppose the plaintiffs had told somebody so, or had written a letter to that effect to a third party,—would that have been evidence?] Perhaps not.

The verdict was not justified by the evidence. Assuming that the names of Anderson & Co. were not mentioned at the time the order was given by Young to Pender, it is clear that they were known to the plaintiffs before the goods were delivered, for, their names are mentioned in the invoices. [WILDE, C. J. The names of the consignees were necessarily communicated to the *plaintiffs. MAULE, J. Melville & [*32 Co. of course informed the plaintiffs on whose account and risk the goods were to be shipped.] In Thomson v. Davenport, 9 B. & C. 90, LITTLEDALE, J., puts this case: "The seller may, in his invoice and bill of parcels, mention both principal and agent; he may debit A. as a purchaser for goods bought through B., his agent. In that case, he thereby makes his election to charge the principal, and cannot after-

(a) See *Hayelden v. Staff*, 5 Ad. & E. 153; 6 N. & M. 659.

wards resort to the agent." And he adds: "The general principle is, that the seller shall have his remedy against the principal, although he may, by electing to take the agent as his debtor, abandon his right against the principal." [WILDE, C. J. The invoice here is just as good to charge Melville & Co., as to charge Anderson.] "*Per*" means "by" or "through," and shows that Melville & Co. were known throughout to have been acting as agents for Anderson & Co. [MAULE, J. The form of the invoices seems to show that the plaintiffs knew Anderson & Co. to be the principals at the time of the contract.] That was the plaintiffs' contention at the trial; but the jury were told that there was no evidence of the fact. [CRESSWELL, J. The drawing of the bills upon Melville & Co. was a strong circumstance against the plaintiffs' right afterwards to resort to Anderson & Co.]

That which occurred between the defendant and Smyth & Co. at Glasgow, amounted to evidence of an account stated: *Chisman v. Count*, 2 M. & G. 307, 2 Scott, N. R. 569. [MAULE, J. It was left to the jury to say whether or not Anderson was originally liable. If that question was properly found for the defendant, that which took place at Glasgow was clearly no evidence of an account stated.] *Cur. adv. vult.*

*33] MAULE, J. A motion having been made in this case for a new trial on the ground of misdirection, and that the verdict was against the evidence, the court took time to consider whether a rule should be granted or not. It was an action brought by certain persons trading under the firm of John Pender & Co., at Manchester, against the defendant, a partner in the house of Anderson & Co., merchants at Bombay, for the price of certain goods which had been bought by persons carrying on the business of commission-agents in London, under the firm of Melville & Co. A question arose at the trial, as to whether or not the names of Anderson & Co. had been mentioned at the time of the purchase of the goods; but it appeared that bills were drawn upon Melville & Co., by Smyth & Co., of Glasgow, at the request and for the use of Pender & Co., for the price of the goods. There is no doubt, upon the evidence, that, at the time the bills were drawn, Pender & Co. were aware that the goods had been bought for Anderson & Co.; and the probability is that they knew at the time, the order was given, that the goods were going to Bombay. It certainly appears to me, that, considering that these goods were bought by Melville & Co. for persons residing at Bombay, and that the plaintiffs took for the amount bills accepted by Melville & Co., there can be no reasonable doubt that the sale was a sale to Melville & Co., and not to Anderson & Co. It is well known, in ordinary cases, where a merchant resident abroad buys goods here through an agent, the seller contracts with the agent, and there is no contract or privity between him and the foreign principal. If that question had been specifically put to the jury, there can be no doubt as to what their decision would have been.

It further appeared, that Melville & Co., who had had large dealings with Anderson & Co., had sent them an account current, in which they debited them with *these bills, as accepted on account of these particular goods; and that remittances had been made by Anderson [*34 & Co. to Melville & Co., to a larger amount than the price of these goods, after Anderson & Co. were aware of the bills having been so drawn and accepted on account of them.

In the course of the summing up, the lord chief justice is represented to have laid down this proposition of law,—putting it as a possible case (though I say the evidence clearly negatived it), that Anderson & Co. were the real buyers of the goods, so that *prima facie* the sellers would have a right to resort to Anderson & Co. as soon as they discovered that fact,—that the transaction which took place between Anderson & Co. and Melville & Co. with relation to these bills, took away the right of Pender & Co. to sue Anderson & Co. for the price of these goods. The correctness of that proposition of law is impugned by this motion.

Several cases have been cited, three of which, viz. Paterson v. Gandasequi, Addison v. Gandasequi, and Thomson v. Davenport, form the foundation of all the law upon this subject. In these cases, the rights of a principal, where the purchase is made by an agent, and the rights of the seller, where the purchase has been made by an agent for a principal disclosed or undisclosed, and whether residing in this country or abroad, have been very fully discussed. There can be no doubt, that, where goods are bought on account of a principal unknown at the time, but who resides in this country, and nothing has been done to show an election on the part of the seller to take the agent as the actual buyer, the seller, on discovering the principal, may sue him for the price. In Paterson v. Gandasequi, and Addison v. Gandasequi, that was ruled or assumed, the seller not knowing that the buyer was dealing for an undisclosed principal. Thomson v. Davenport carried the rule a *little [*35 further, and decided, that, where the broker states that he has a principal, but does not disclose who he is, the seller, on discovering such undisclosed principal, may have recourse to him. Assuming him to be a principal, he is the real buyer, and ought to pay, unless there be something in the transaction which makes it inequitable or unjust that he should pay. The court there intimated, that there was a question which might have been raised, viz. whether, since Thomson, the party for whom the goods were bought, resided in Dumfries, and the sellers in Liverpool, the credit might not have been given exclusively to the agent. But it was assumed that Thomson was the buyer of the goods; and the argument was, that, inasmuch as the seller knew that the goods were bought for an undisclosed principal, whose name he did not choose to ask, he must be taken to have contracted with the broker only. That was the only question raised. Had it been insisted there, that there was no principal at all other than the actual buyer, the decision might have been

in favour of the defendant. That case, in effect, decides, that, if the principal is not named, it is the same as if none exists. There are, however, *dicta* there which seem to sustain the ruling upon the present occasion. BAYLEY, J., observes: "It is said that the seller ought to have asked the name of the principal, and charged him with the price of the goods. By omitting to do so, he might have lost his right to claim payment from the principal, had the latter paid the agent, or had the state of the accounts between the principal and the agent been such as to make it unjust that the former should be called upon to make the payment." In the opinion, therefore, of that learned judge, the right of the seller to sue the principal, is limited, not by payment only, but by the state of the accounts between the agent and the principal, making it unjust that *36] recourse should be had *against the latter. Something to the same effect is said by Sir JAMES MANSFIELD, C. J., in *Railton v. Hodgson, and Peele v. Hodgson*, which are cited in a note in 2 Smith's Leading Cases, 207. Sir JAMES MANSFIELD there said: "If Hodgson (the assumed buyer, who was really the principal, though he pretended to be an agent) had really paid Smith, Lindsey, & Co. (upon whom he had directed the sellers to draw bills for the goods), it would have depended upon the circumstances, whether he would be liable to pay for the goods over again: *if it would have been unfair to have made him liable, he would not have been so.*" These two *dicta*,—and I find nothing in any other case to detract from their authority,—seem to me to afford a sensible rule on the subject.

But here it is said, that, as the remittance made by Anderson & Co. to Melville & Co., to put them in cash, amongst other purposes, to meet these bills upon which they had so incurred a liability, was made before the expiration of the credit for the goods, the payment could not, according to the decision in *Kymer v. Suwercropp*, have the effect contended for. Payment, however, is only put, in the *dicta* to which I have adverted, as one instance of its being unjust or unfair that the seller should enforce the contract against the principal.

Kymer v. Suwercropp was a case in which four specific quantities of coffee were sold upon certain terms which are mentioned in the report in *Campbell*, but which are not alluded to in some of the books in which that case is cited. The coffees were sold on the 10th, 17th, and 24th of June, and 1st of July,—not upon a month's credit,—but they were sold by public auction, to be weighed and taken away within a month from the day of sale, and to be paid for on delivery. The purchaser, therefore, was bound to pay for them within a month: but he was at liberty, at any time within the month, to take them away and pay for *37] them. What *was done was this:—The coffees were bought by Kenyon & Co., as brokers for the defendant; which was not known to the plaintiffs until the 8th of July, on which day Kenyon & Co. became insolvent. A great part of the coffee had previously come to the

defendant's hands, the warrants for the delivery of it from the West India Docks having been given him by Kenyon & Co., who had received them from the plaintiffs. For so much he paid Kenyon & Co., by accepting a bill, dated the 15th of June, drawn by them upon him, for 751*l.*, at one month after date, which was satisfied when it became due. The residue of the coffee was stopped by the plaintiffs *in transitu*. However, at the expiration of one month from the respective sales, the plaintiffs sent a clerk to demand payment of the defendant. The clerk, on one of these occasions, offered, on being paid, to give the defendant the remaining warrants (although he had them not at that time about him); but the defendant refused to pay. Here, then, is a purchaser who had no right to receive the coffee without paying for it, which he was bound to do within a month. If he obtained it within the month without paying for it, he obtained it contrary to the contract. It is not at all probable that Kenyon & Co., who were upon the verge of bankruptcy, would be in advance by paying for the coffee when they were not bound to do so. It is much more probable that what was done was done by Kenyon & Co. and the defendant in fraud of the plaintiffs,—the defendant getting possession of the coffee without paying ready money for it, which he had no right to do, and Kenyon & Co. getting a bill, which in their then circumstances might be of service to them. In that state of things, —Kenyon & Co. having stopped payment before the expiration of the month,—the sellers, on the day on which the month expired, tendered the warrants for the rest of the coffee to the defendant, and *de-^{[*38}manded the money. With respect to this portion of the coffee, it was a clear case of goods bargained and sold. As to the other portion of the coffee, which had come to the defendant's hands, the defendant said—"I will not pay you (the sellers); I have already paid Kenyon & Co." To which the plaintiffs replied—"If you had paid Kenyon & Co. in cash, we might have been bound by that payment. But, as you have not done so, but have given a bill for the amount, you have not paid for the coffee according to your contract. You have, therefore, obtained it under circumstances which do not entitle you to set up that payment." That, probably, was the view which Lord ELLENBOROUGH took of the case; and it would clearly sustain the right of the plaintiffs to recover the price of the coffees, assuming the facts to be as I have stated them. I have already observed that that case has been treated as the case of a sale upon credit. It was not so in fact: the vendee at no time had a right to obtain possession of the goods without paying the price. Lord ELLENBOROUGH says: "A person selling goods is not confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought; and he is no more affected by the state of accounts between the two, than I should be, were I to deliver goods to a man's servant pursuant to his order, by the consideration of whether the servant was indebted to the master, or the master to the servant.

If he lets the day of payment go by, he may lead the principal into a supposition that he relies solely on the broker; and if in that case the price of the goods has been paid to the broker, on account of this deception the principal shall be discharged. But here payment was demanded of the defendant, on the several days it became due, and no reason was given him to believe that his broker alone was trusted. He has received *39] a great part of the coffee, and enjoyed the *benefit of it; the right of the vendors is entire, unless he has paid them, or some person authorized by them to receive payment; Kenyon & Co. had no such authority; therefore he is still liable. The rest of the coffee was stopped only to prevent its getting into the hands of the insolvent brokers; and, as payment was to precede the delivery, it was enough if the plaintiffs, on being paid, were ready to have delivered it." That decision is clearly supported by the facts. In a subsequent page of the same volume of Campbell's reports, 1 Camp. 180, (c), the following note appears:—"In *Kymer v. Suwercropp*, a rule for a new trial was discharged,—on the ground that the defendant had not properly substantiated the fact that he had paid the broker for the coffee delivered to him; but the court did not give any decided opinion as to the effect of payment by the vendee to the broker before the day of prompt, when the warrants for the delivery of the goods have been parted with by the vendor, and passed to the vendee." The Court, therefore, seems to have adverted to the case of a payment to the broker, *according to the terms of the contract*, though without giving any opinion as to the effect of such a payment. Lord ELLENBOROUGH must, however, be considered as having decided, and properly decided that, under the circumstances of that case, the defendant had no right to set up a payment accepted by the brokers contrary to their duty, and not made by him in conformity with the obligation which the contract imposed upon him. That is all that the decision amounts to; and it seems to me to be quite consistent with the doctrine of Sir J. MANSFIELD, C. J., and of BAYLEY, J., in the cases I have before adverted to. *Kymer v. Suwercropp* is stated as if it established this,—that, in no case, shall a transaction between *40] broker and principal have the *effect of barring the right of the seller to recover as against the principal, except payment according to the contract, that is to say, payment *at or after* the time limited by the contract. It in truth decides nothing of the kind: it decides that the vendee is not discharged, where there is no injustice done by holding him liable,—as, where he has not paid honestly in pursuance of the contract: but it by no means decides that there are no circumstances that can occur, except payment at or after the day stipulated for by the contract, that shall operate in discharge of the principal's liability to the seller. It leaves the general question wholly untouched. The difference between *Kymer v. Suwercropp* and the present case is very striking. The transaction there relied on to deprive the vendors of the

right to resort to the principal, was a transaction which took place between the brokers and the vendee, without the knowledge of the vendors, and contrary to their interest, and in violation of the terms of the contract. If, in that case, the bill, instead of being given by Suwercropp to Kenyon & Co., had been given to Kymer & Co., the plaintiffs, or if the plaintiffs had known of it, or had desired Suwercropp to give the bill to Kenyon & Co., and had directed Kenyon & Co. to give up the warrants on receipt of the bill,—the plaintiffs would have been bound thereby, because parties to the transaction. That would have been much nearer to the transaction now in question.

In the present case, the whole is done for the benefit of the vendors. Pender & Co. were desirous of having negotiable instruments with the names of Melville & Co. upon them. The arrangement, therefore, is made, not behind the backs of the plaintiffs, but with their knowledge and concurrence; it is in truth their own act.—They knew when they received the bills from Melville & Co., that Anderson & Co. were Melville & Co.'s *principals. They knew also that Anderson & Co. [*41 lived in Bombay, to which place they themselves had directed the goods to be shipped. So that they took the bills with the knowledge that they were to be provided for by the house at Bombay. The natural and proper course, under such circumstances, was, that Anderson & Co. should remit funds to Melville & Co., to meet their acceptances, before they arrived at maturity. Melville & Co. becoming insolvent, Anderson & Co. are now sued for the price of the goods; and the question is whether it is fair and reasonable that they should be so charged. It is clear that Anderson & Co. have, in the necessary performance of their duty, and under an arrangement made by the plaintiffs themselves, paid the money to Melville & Co. The plaintiffs got what they at the time considered an advantage, viz. the security of Melville & Co.: and they must be taken to have requested that all might be done that was necessary and incident to the arrangement: and therefore the remittance that was made by Anderson & Co., to provide for the bills, was substantially made by them with the cognisance and at the request of the plaintiffs. Can they, then, be permitted to call upon the defendant,—who has done nothing whatever in contravention of the contract entered into by his firm, nothing in fraud of the plaintiffs, and nothing of which the plaintiffs were not fully cognisant and did not desire to be done, or know must necessarily be done,—to pay the price of the goods over again? It seems to me that the case falls within the rule, laid down by Sir J. MANSFIELD and BAYLEY, J., by which a party is held to be discharged, where it would be evidently unfair and unjust to charge him. I think it a clear and satisfactory case of non-liability on the part of the defendant, who, in the course of a transaction to which the plaintiffs themselves were parties, has done that which substantially is a payment *in [*42 the ordinary course of business. The fact that the money was

paid before the bills became due, does not, in my opinion, prevent the defendant from availing himself of this defence. Where all the parties are living in this country, and the agent has not accepted bills on account of the goods, so that the duty of putting him in funds by a previous remittance does not arise, if the principal pays the broker before the proper time has arrived, and without the privity of the seller, one can perceive the justice of not permitting the principal to set up such premature payment in answer to the seller's claim on him for the price.

It seems to me to be clear,—even upon the assumption that Anderson & Co. were concealed principals (upon which assumption alone the question could arise),—that the ruling of the lord chief justice was conformable to an established principle which it would be inconvenient to shake by the expression of a doubt about it.

It has been contended that this defence was not open to the defendant under non assumpsit. I have already expressed an opinion that the defence was admissible under that plea. A plea setting out all the facts out of which the defence arises, would only be a roundabout way of pleading non assumpsit. There is nothing from which an assumpsit could be implied; for, Anderson & Co, had paid the money before any liability could accrue. The defendant, therefore, never was indebted to the plaintiffs for goods sold and delivered.

For these reasons, I am of opinion that no rule should be granted in this case.

WILDE, C. J. Concurring, as I do entirely, with what has fallen from my brother MAULE, I will only add a word or two respecting the case of *Kymer v. Suwercropp*, which has not been very well understood.

*43] The *marginal note states the point decided by Lord ELLENBOROUGH to be this,—“If goods are bought by a broker, the principal is liable to the vendor, if called upon when payment becomes due, although he has previously paid the price of the goods to the broker: *Secus*, if the day of payment is allowed to pass by without any demand being made upon the principal.” How is that borne out by the facts? By the terms of the contract, the time of payment was, the delivery of the goods, which was to be within one month from the respective days of sale. The warrants for part of the goods were delivered by the brokers of the sellers to the brokers of the buyer. When these were delivered, the money payable in respect of them became due; and, if the buyer had paid the money at that time, he would have paid it when it became due. The objection, however, was, not that the money was paid before it became due, but that it never was paid at all according to the contract. The case, therefore, does not involve the principle in support of which it has so frequently been cited.

CRESSWELL, J., and V. WILLIAMS, J., concurring, Rule refused.

CLOSSMAN v. WHITE. Jan. 25.

The bailment in detinue is not traversable.

To a count in detinue on a bailment, in the usual form, the defendant, who was under terms to plead issuably, applied, by summons, to V. WILLIAMS, J., at chambers, for leave to plead the following pleas,—

*First, non detinet.

Secondly, *a denial of the delivery of the goods to the defendant.* [*44

Thirdly, *a denial of the terms upon which the goods were alleged to have been delivered.*

Fourthly, that the goods were not the goods of the plaintiff at the time of delivery, but that the defendant had no notice thereof; that afterwards the true owner gave notice of his title, and forbade the defendant to deliver the goods to the plaintiff, and insisted on his retaining them, and threatened an action; and that the defendant *bona fide* withheld them in consequence.

Fifthly, that, after the goods had been delivered to the defendant, and whilst they were still in his possession, the plaintiff ceased to be owner of the goods, by transferring them to one P. Clossman, who gave notice to the defendant, and prohibited him from delivering to the plaintiff; wherefore, &c.

Sixthly, exoneration and discharge by mutual consent before the alleged detention.

Seventhly, leave and license.

The learned judge having declined to allow the second and third pleas, on the ground that the bailment was not traversable,

Greenwood, on a former day, obtained a rule nisi to add the *second* plea. He submitted, that, where the bailment is the very ground of the action, the defendant is wholly undefended unless he is at liberty to traverse it; that it is only where the bailment is founded on property in the plaintiff, that it is not capable of being traversed, the bailment in that case being a pure fiction; and that the property, though put in issue by non detinet before the new rules of pleading, is not so now. He referred to *Rastall's Entries*, 212, *Mason v. *Farnell*, 12 M. & W. 683, *Clements v. Flight*, 16 M. & W. 49, and *Whitehead v. Harrison*, 6 Q. B. 423. [*45

Byles, Serjt., now showed cause. The proposed plea is clearly a bad one. This matter underwent very full discussion in *Gledstane v. Hewit*, 1 C. & J. 565, where, to a count in detinue, on the bailment of a promissory note, to be re-delivered on request, the defendant pleaded that the plaintiff had deposited the note with him to be kept as a pledge and security for the re-payment of a loan of 50*l.*; and the plaintiff replied a tender of the 50*l.*; and this was held to be no departure. On the part of the defendant, it was submitted that the replication was a

departure; that it did not support the declaration, but contained matter which would defeat the right of action as stated in the declaration; that the contract stated in the plea, and admitted by the replication, was totally different from that stated in the declaration,—the one alleging a general bailment, the other a bailment for a special purpose, which might and ought to have been traversed in the replication: and *Kettle v. Bromsall*, Willes, 120, and *Mills v. Graham*, 1 N. R. 140, were cited. But BAYLEY, B., said: “The nature of the action of detinue is, that the detainer is the gist of the action. The plaintiff must make out that he was entitled to the delivery of the article, and that the defendant wrongfully detained it; and, if he can do that, he has done all that is necessary to maintain his action. He is not bound to show the circumstances under which the article came into the defendant’s hands. It may have come into the defendant’s hands by bailment, by pledge, which is a species of bailment, by finding, or by other means. The action of detinue is an *46] action of wrong,^(a) and it is only necessary *to prove so much as is material: and the question in this case, is whether the allegation that the note was to be re-delivered on request, is essential, to entitle the plaintiff to recover in this case. The defendant pleads what in substance amounts to this,—that the note was delivered on pledge, viz. that he was to hold it until the plaintiff paid him 50*l.*, which is a different bailment from that stated in the declaration. If the declaration is to be considered as binding the plaintiff to a contract to re-deliver on request, the defendant’s plea should have concluded with a traverse; it should have stated that the note was delivered by way of pledge, and have traversed that it was delivered, to be re-delivered on request. That would have been essential if the bailment in the declaration were material; but the authorities show that such a traverse is not the common course of pleading; and the defendant must show such a delivery as will give him a continuing right to withhold the article. If the plaintiff means to insist that the article was not delivered on the terms mentioned in the plea, he is at liberty, in his replication, so to do; but it is not for the defendant to tie him down to the bailment stated in the declaration, by a traverse. If the plaintiff does not mean to deny the terms which are stated in the plea, he may show, that, even upon those terms, the defendant has no right to withhold. Therefore, to a plea of this description, the plaintiff has the option to deny the species of delivery on which the defendant insists, or to show such circumstances, as, admitting the delivery, establish that the defendant is guilty of a wrongful detention. As it seems to me, that is clearly to be deduced from the case of *Bateman v. Ellman*, Cro. Eliz. 866, and the other authorities on the same point. In Brooke’s Abridgment, Title *Detinue de Biens*, pl. 50, it is *47] said: “In detinue, it *is no plea that plaintiff did not bail as laid, for, the bailment is not traversable, and the defendant shall

(a) But detinue (at least, detinue on a bailment) may be joined with debt.

answer to the *detinue*.”(a) So, Dyer,(b) in *detinue* for forty quarters of wheat, the plaintiff declared simply on a contract for wheat, &c.; the defendant pleaded, that the plaintiff bought of him eighty quarters, upon condition that, when plaintiff came for the wheat, he should pay immediately, or otherwise the whole to be void; and, further, that the plaintiff had received thirty quarters, and paid him for them, and, at another day, came and received ten quarters, and had not paid for them, so that the contract became void;—thus not traversing the contract as stated in the declaration, *simpliciter*, but going on to state circumstances which would justify him in withholding the corn. Then the question was raised, whether the defendant ought not *to have concluded his [48 plea with a traverse; because, it was said, the plaintiff states an unconditional contract, which binds the defendant to deliver at all events, and the defendant says it is a conditional contract. No, said the court, that ought to come from the plaintiff. If the plaintiff means to insist that there was not such a contract as that stated in the plea, but such as his declaration implies, he should state it in his replication. Now, that case shows that the statement in the declaration is not a statement which binds the plaintiff, but that he is at liberty afterwards to answer the plea of the defendant. The defendant must show that the bargain stated by him justifies him *in that which is the gist of the action*,—the *detainer*; and then the plaintiff is at liberty to deny the contract as the defendant states it, or to show (that being the true contract) that there is a wrongful detention on the part of the defendant. *Bateman v. Ellman* is exactly analogous to that case which I have mentioned from Dyer. The plaintiff declared, *simpliciter*, on a bailment to the defendant of plate to be re-delivered on the 17th of May: on a plea of *non detinet*,—which put the whole of the declaration in issue (as it seems to have been considered in *Mills v. Graham*),—the jury found specially, that the goods were bargained and sold to the defendant by indenture, on a condition, that, if the plaintiff paid such a sum upon the 17th May fol-

(a) For this position Lord Brooke cites an original case,—not reported in the Year Books,—of 3 H. 4. And see the placitum in Brooke translated, 7 Vin. Abr. p. 33, pl. 8.

(b) *Anon. fo. 29, b.* But, although that case is intitled “*Detinue*,” it is obvious that the action was not *detinue*,—i. e. an action brought to recover *in specie* the possession of certain specific goods,—but *debt in the detinet*, to enforce the delivery of a certain quantity. The plaintiff declared upon the non-delivery to him of 40 quarters of wheat, which he alleged he had contracted to buy of the defendant. No possession was laid in the plaintiff; nor was there any allegation of transfer or change of the possession, by bailment, finding, or otherwise. The defendant might have satisfied the engagement stated in the declaration, by the delivery of any 40 quarters which came within the description of the wheat bargained for. If wheat had been delivered to the plaintiff, and afterwards bailed to the defendant, an action of *detinue* would have lain. This distinction is recognised in H. 6 E. 4, fo. 11, pl. 7.

The case in Dyer appears to go much beyond the point for which it is cited by BAYLEY, B., in the above judgment; and it seems not to be reconcilable with the authorities in which it has been decided, that, where the contract of sale is, in truth, conditional, and the plaintiff declares as upon an absolute contract, the defendant cannot plead the condition, but must simply deny the contract declared on. See *Haysselden v. Staff*, 5 Ad. & E. 153, 6 N. & M. 669, and the cases there cited.

lowing, the bargain should be void; and they found that the money *was* paid on that day. No doubt that was a finding of a delivery on different terms from those stated in the declaration; but the court said it was well enough; for, the condition being performed by payment of the money, the plaintiff ought to have the goods again, and then the detention is a tort. That case, as it seems to me, shows that the plaintiff is not tied down to the terms of bailment stated in his declaration." And, *49] after observing *upon the cases of *Kettle v. Bromsall* and *Mills v. Graham*, the learned baron concludes: "Thus, the authorities seem to show, that, though a bailment is stated in the declaration, it is not an essential part of the declaration, and that the plaintiff may or may not at his election, in his replication, make the terms of the delivery material; but it is for him only to do so; and he is not tied down to the species of bailment stated in his declaration: and, if he can make out that he was entitled to the possession and re-delivery of the goods, and that the defendant wrongfully withheld them, he will be entitled to recover." That case was followed in *Walker v. Jones*, 2 C. & M. 672. *Mason v. Farnell*, 12 M. & W. 674, shows that, since the new rules, the defendant cannot, under non detinet, or not possessed, set up a title inconsistent with the plaintiff's title. In *Whitehead v. Harrison*, 6 Q. B. 423, a count in detinue stated that the plaintiff delivered an indenture of him the plaintiff to the defendant, to be re-delivered on request, and then averred a detainer after request. The plea traversed the bailment: and, upon demurrer thereto, Lord DENMAN, delivering the judgment of the court, said: "Doubtless, before the new rules, the common bailment was not traversable; as was decided by the court of Exchequer in the cases of *Gledstane v. Hewit* and *Walker v. Jones*. The only question is, whether the new rule which has confined the plea of non detinet to a simple denial of the detainer, makes any difference. That such is the effect of the new rule, see the rule itself, (a) and *Jones v. Dowle*, 9 M. & W. 19. It was argued for the defendant that he could not traverse the property of the plaintiff, because the words 'of the plaintiff' are immaterial, and are not to be found in the old entries in *Rastall* and other books; and that, *50] as the case of the plaintiff might really consist of some attempt to prove an actual contract of bailment, there is now no way to put him upon proof of his case, unless this traverse is allowed: then it seems most unjust to compel the defendant to plead specially, and take the *onus* of proof on himself, instead of being able, in this, as in all other cases, to put the plaintiff upon proof of his right. On the other hand, the plaintiff relies on the authorities, which show that he is at liberty, notwithstanding the averment of bailment, to show any other mode by which the goods came into the hands of the defendant, and consequently that the bailment is not traversable. The recent case, in the Exchequer, of *Mason v. Farnell*, favours this view of

(a) *Hilary*, 4 W. 4. Pleadings in particular Actions, III.

the case: and, however hard it may appear upon the defendant, we feel ourselves bound by the authorities to hold that the plea traversing the common bailment is bad. It should seem that some alteration is requisite in the declaration, and that the plaintiff should be bound to state truly *how* the goods came into the hands of the defendant; and then his statement would be traversable: (a) but, until such alteration be made by the proper authority, we must abide by the decided cases." In *Clements v. Flight*, 16 M. & W. 42, the declaration alleged that the plaintiff delivered certain paper-writings, purporting to be scrip-certificates for shares, to the defendant, to be delivered on request, after payment to him of a certain sum, averring that that sum was paid to the defendant, and assigning for breach that the defendant had not delivered the paper-writings, though requested, but detained the same: the defendant pleaded that the paper-writings were deposited with him as a pledge and security for 210*l.* advanced by him to the plaintiff, and that, on payment of that sum, the defendant tendered and offered to deliver up and return them to the plaintiff, *who then refused to receive them: and the plea [51 was held bad, on demurrer, for denying the detention argumentatively, and for amounting to non detinet. POLLOCK, C. B., in giving judgment, said: "In the course of the argument, it was suggested that the plea was bad, as containing an argumentative denial of the special bailment in the declaration. On reference to the late case of *Whitehead v. Harrison*, and the authorities there referred to, and particularly *Gledstane v. Hewit*, and *Brooke's Abridgment*, tit. *Detinue de Biens*, pl. 50, it seems, that, not only the common bailment, but any special bailment laid in a declaration of detinue is merely surplusage, and not traversable, (b) the gist of the action being, the detainer of the plaintiff's goods, which the defendant must answer. The plea, therefore, was not open to this objection." (c) [V. WILLIAMS, J. The principle seems to be based on the doctrine that it is no departure to state in the replication a totally different case from that in the declaration. MAULE, J. Suppose the goods were delivered to the defendant, to be re-delivered by him to the plaintiff on payment of 10*l.*, how is the defendant to raise that, otherwise than by traversing the delivery *modo et forma*? V. WILLIAMS, J. The new rules seem to assume that the declaration will in all cases state that the goods are the *goods of the plaintiff*.]

Greenwood, in support of the rule. The question is, whether the proposed plea is so clearly non-issuable that the defendant ought not to be allowed to put it upon the record. The action must be undefended, if the whole defence is, that the property is, and always has been, the defendant's. It is true that many of the old *precedents do not contain any allegation of property in the plaintiff. But there are [52

(a) Vide tamen, *Dyer*, 29 b, *suprà*, 47.(b) *Suprà*, 47 (a).

(c) If the bailment were directly traversable, a plea of lien would appear to be bad, as an argumentative traverse of the unconditional bailment alleged.

instances of special traverse of the bailment in manner and form as alleged. One in Rastall, Title *Detinue de Chattels*, fo. 212, is as follows: "H. B. summ̃ fuit ad respond. J. B. de placito q₂ reddat ei catalla ad valenē xx. l. que ei injuste detinet, &c. Et unde, &c., q₂ ipse die, &c., anno, &c., apud A., deliberasset cuidam J. A. catalla p^d, videl't, unam crateram argenti, &c., ad valenē, &c., et unam aliam crateram, ad valenē, &c., salvo custodiend., et eidem J., cum inde requisit. fuisset, reliberand.; virtute cujus liberationis idem J. de crateris fuit possessionat. Idemq, J. A. sic inde possessionat' easdem crateras, &c., apd. A. pred. die, &c., añ, &c., casualiter amisit: et pred. crater, &c. postea, scilicet, die, &c., añ, &c., ad manus et possessionem ipsius H. per inventionem inde apd. A. pred. devenissent; p q₂ actio accrevit eidem J. ad exigend' et hend' de p^{re}fat' H. crateras, &c.: idem tamen H., licet sepius requisit', p^d crateras, &c. eidem J. nondū reddidit, sed ill' ei hucuesq, reddere cōtradixit, et adhuc cōtradicit, ac illas ei adhuc injuste detinet. Unde dicit, &c." To which the defendant pleads—"Et pred' H., per C., attorñ suu, veñ, &c., et dicit q² pred' J. actionē nō, q̃a dicit q² idem J. p^d xx. die J., apud A. pred', mutuat' fuisset de p^{re}fat. J. A. x. l. eid' J., cū inde requisit' fuisset solvend': et p securitate solutionis earund' x. l. idem J. B. adtunc et ibidem deliberavit eidem J. A. p^d' crateras, &c., ad ea sibi custodiend' et retinēd' quousq, idem J. B. solveret eid' J. A. pred' x. l. Virtute cujus liberationis idem J. A. de crater, &c. fuit possessionat'; et sic inde possessionat' obiit intestat'; post cujus mortem, p eo q² idē J. A. tēpe mort' sue fuit possessionat' de di^{vi}s bon' et cat. in di^{vi}s dioces. inf^r reg. dñi Regis Angl', reverendissimus in xpo pater T., ep^{us} Cantuarien. sequestravit oīa bona et catalla que fuēr pred' J. tem-
*58] pore mort' sue: et postea, *scilicet, sexto die N., anno, &c., idem ep^{us}, per literas suas administrat', apud A., in cōm pred', cōmisit eidem H. administrationem bonorum et catallorum que fuēr pred' J. A. tempore mortis sue. Virtute cujus idē H. pred' crateras, &c., ut bona et catalla que fuerut pred' J. A. tempore mort' sue, apud A. pred' cepit, et inde fuit, et adhuc existit possessionat' q² q, p^d J. B. p^d x. l. p^{re}fat J. A. in vita sua, nec eidem H. post mortem ejusdem J. A., nondum solvit; *absque hoc* quod pred' J. B. deliberavit crateras, &c., p^{re}fat' A., ad eas salvo custodiēd', et eid' J. B., cum inde requisit' fuisset, reliberād', in forma qua idem J. B., per narrationem suam pred' superi' suppoñ: et hoc parat' est verificare, unde pet' judm si pred' J. A. actionem, &c." And the plaintiff replies—"Et pred' J. B. dicit q² ipse deliberavit p^{re}fat. J. A. crateras, &c., ad eas salvo custodiēd', et eid' J. B. cu inde requisit' fuisset, reliberad', in forma qua idem J. B. p narrationem suam pred' superi' suppoñ: et hoc pet' q² inquiretur per patriam, &c." [CRESSWELL, J. Is not that rather in the nature of a contract for safe custody, which would bind the defendant to a greater degree of care than an ordinary bailee would be bound to take? WILDE, C. J. The defendant is not there traversing the bailment alleged, but setting

up a different bailment. CRESSWELL, J. The defendant sets up a property in himself.] He traverses the bailment as alleged in the declaration. In Co. Litt. 283 a, it is said: "In detinue, the defendant pleadeth non detinet; he cannot give in evidence that the goods were pawned to him for money, and that it is not paid, but must plead it; but he may give in evidence a gift from the plaintiff, for that proveth he retaineth not the *plaintiff's* goods." Lord DENMAN, in the course of the argument in *Whitehead v. Harrison*, says: "There are two forms of declaration in detinue; one, alleging a delivery by the plaintiff to the defendant; the other, a *finding by the defendant. In the first, [*54 no right of property in the plaintiff is set up; in the other, it is. The distinction does not seem to have been contemplated in framing the new rules." [V. WILLIAMS, J. The averment in the declaration being altogether superfluous and immaterial, I cannot see why it should make any difference. CRESSWELL, J. Brooke's Abridgment, title *Chartres de Terre, et detinue de eux*, pl. 22, citing M. 9 H. 5, fo. 14, pl. 22, is a strong authority to show that the allegation of a bailment is immaterial: "In detinue of charters, the plaintiff (Sir John Grey) counts that they were delivered to Sir H. N. (Sir Hugh Hales) to safely keep, and that, after his death, the same charters came to the hands of the defendant, and does not show how, whether by bailment, trover, or as executor, or otherwise; and the opinion of the court was, that the count was good:" S. C. Fitz. Abr. tit. *Detinue*, pl. 33.]

WILDE, C. J. It seems to me that this plea ought not to be allowed, and that the refusal to allow it in truth places the defendant in no difficulty whatever. The proposed plea is opposed to the current of authorities from a very early period. From Brooke's Abridgment, downwards, all the authorities have uniformly held that the bailment in detinue is not traversable: and I do not find anything in the new rules to call for any alteration in this respect. In detinue, the gist of the action is the detainer: the bailment is altogether immaterial,—in the sense of being traversable; it is like the allegation of the loss, in a count in trover. The plaintiff may allege any bailment he pleases. The defendant may plead anything which tends to show his detention of the goods to be lawful. It may be that the plaintiff in his declaration sets up a true bailment; but he is not bound by it. The replication may set up the very bailment stated in the declaration, and so it *may become [*55 material. But, whether the matter appears in the declaration or not is quite immaterial. I find no limitation or restriction of that rule in any of the cases: and the reason is obvious; for, if the gist of the action is the detention, it follows that the defendant may show the detention to be lawful. The argument has proceeded upon an assumption that the defendant was under some difficulty in that respect. But that is altogether a misapprehension. It is competent to the defendant to show that the plaintiff was a stranger to the goods, or to set up any

title inconsistent with the plaintiff's claim. This matter was very much gone into in *Gledstone v. Hewit*. The authority upon which that case was founded, goes to the whole root and substance of the present case. It may be that the goods were the plaintiff's, and yet the detention of them by the defendant may have been lawful. No ground has been, or could be, shown to warrant this plea. The rule, therefore, will not be granted.

MAULE, J. I also think that the proposed plea is not sanctioned by any authority. The new rules certainly make the older authorities less clear and less applicable, but I do not think they make the difference that is suggested. The defendant, no doubt, ought to have some mode of setting up the defence he wishes to establish, viz. that the goods in question are not the plaintiff's goods; but this is not the proper way to do it. The bailment in detinue certainly was not traversable, before the new rules. If it was; it would have been traversed by non detinet. But the cases show that it was not so. The only effect of the new rules, is, to control and limit the effect of non detinet: and, if that plea did not, before the new rules, operate a traverse of the bailment,—which is quite *56] clear,—the new rules have no operation at all upon the *question. The defendant is put to avail himself of his defence in some other way. I do not think the matter quite so clear as it seems to the other members of the court to be; but, upon the whole, I concur with the lord chief justice in thinking that there is no ground for allowing this plea.

CRESWELL, J. I am of opinion that the plea proposed to be added in this case ought not to be allowed. I am not aware that the new rules have ever been considered as operating to make good pleas that would have been bad before; though they make many pleas bad that would have been good before. In Bro. Abr. *Detinue de Biens*, pl. 50, *suprà*, 47,(a) it is laid down upon the authority of a case in the Year Book, 3 H. 4,(b) that, “in detinue, it is no plea that *ne baila pas*; for the bailment is not traversable; for, he shall answer to the detinue.” If we were to allow this plea, it would be in direct defiance of that authority: it would be traversing the bailment, and confessing the detinue. The authorities on the subject were reviewed with great care by BAYLEY, B., in *Gledstane v. Hewit*, who comes to this conclusion: “The authorities seem to show, that, though a bailment is stated in the declaration, it is not an essential part of the declaration, and that the plaintiff may or may not, at his election, in his replication, make the terms of the delivery material; but it is for him only to do so; and he is not tied down to the species of bailment stated in his declaration: and, if he can make out that he is entitled to the possession and re-delivery of the goods, and that

(a) And see H. 14, H. 4, fo. 28 b. acc.

(b) There is no such case in the book of that year; nor—there being no reference to any folio or placitum—does Lord Brooke profess to cite any Year Book. *Suprà*, 48.

the defendant wrongfully withheld them, he will be entitled to recover." The plaintiff may declare on a bailment, and *prove a finding.(a) [*57 Having the high authority I have referred to, to start with, and seeing that the modern practice has uniformly gone in accordance with it, I think this plea ought not to be allowed.

V. WILLIAMS, J. I am of the same opinion. It was well established, before the new rules of pleading, that, in detinue, the defendant could not traverse the bailment: and there is nothing in the new rules to make the allegation of bailment a material and traversable allegation, or to require the plaintiff in such case to prove that which before he was not bound to prove. The cases of *Whitehead v. Harrison* and *Mason v. Farnell* show that the new rules have not made any difference in this respect.

Rule discharged, with costs.(b)

(a) Bro. Abr. tit. *Bailment*, pl. 5 (translated in Viner's Abridgment, *Detinue* (D. 5), pl. 14), refers to P. 7 H. 6, fo. 22, pl. 3. There, in detinue for charters (bailed), the defendant said that he found them, and that others had brought the like action *absque hoc* that the deeds were bailed to the defendant by the plaintiff, and he prayed that the parties might interplead. This plea was held by MARTIN, J., to be good; "for, unless he had traversed the bailment, the plea would not have served him; for, if you bailed the charters to him, he is chargeable as against you, and, as against him, the property is in you; and, although others have writs against him, he acknowledges the property to be in you, for, inasmuch as he accepted them of your delivery, he so understands it; wherefore he may say, as against the others, non detinet. But, if he were neither bound nor estopped as against any of you, by any bailment, and the goods come to him by chance (*per fortune*), and he claims nothing, he cannot plead in bar. But each of you who have an action pending, claim the deeds; wherefore, it is reasonable that you should interplead, and that each of you should show his right. And it was said in that case, that, if one finds my goods, I may elect to have a general writ, or a writ upon the matter."

(b) In debt, the defendant pleaded that she had deposited certain jewels, as a security, with the plaintiff, who had not returned them: the court refused to give judgment for the plaintiff; saying that they had no power to award restitution of the jewels: M. S. Year Book of Edw. I., Lincoln's Inn Library. And see Yelv. 178, 9; 1 Scho. & Lefr. 177.

*JONES v. BOXER, Executrix, &c. Jan. 15.

[*58

The 10th section of the 2 W. 4, c. 39, does not apply to writs of *distringas*.

A writ of summons issued against the defendant on the 8th of August, 1848, and was returned and filed on the 8th of January, 1849,—which was a day too late. A *distringas*, however, had been obtained on the 1st of November, 1848, under which an appearance was entered for the defendant:—Held, that the declaration properly alleged the defendant to have been summoned "by virtue of a writ issued on the 8th of August, 1848,"—the *distringas* coming in the place of personal service of the summons.

THIS was an action of *assumpsit* by endorsee against endorser of a bill of exchange for 30*l.*, bearing date the 14th of June, 1842, and payable at three months.

The writ of summons issued into Middlesex on the 8th of August, 1848, and was returned and filed on the 8th of January, 1849.

A writ of *distringas*, tested on the 1st of November, 1848, was served at the defendant's dwelling-house on the 18th; and an appearance was thereupon entered for the defendant.

The declaration stated the defendant to have been summoned to answer the plaintiff "by virtue of a writ issued on the 8th of August, 1848."

The defendant pleaded, amongst other things, that the supposed causes of action in the declaration mentioned did not, nor did any or either of them, accrue at any time within six years next before the commencement of the suit.

J. Brown moved for a rule calling upon the plaintiff to show cause why the issue should not be set aside, on the ground that the defendant should have been alleged to have been summoned by virtue of a writ issued on the 1st of November, 1848, the writ of summons not having
 *59] been returned and filed within the time required *by the 2 W. 4, c. 39, s. 10.(a) In *Pratt v. Hawkins*, 15 M. & W. 399, which was an action on a bill of exchange dated in May, 1838, the original writ of summons into Middlesex was issued on the 15th of August, 1844; on the 14th of January, 1845, it was returned *non est inventus*, and filed and entered of record; on the same day, an *alias* writ of summons was issued into Middlesex; on the 10th of June, 1845, a *pluries* writ of summons was issued into Surrey, and served the same day, and the defendant duly appeared to it; the plaintiff declared, and the defendant pleaded that the cause of action did not accrue within six years next before the commencement of the suit. The *alias* writ of summons was not in fact returned or entered of record till the 4th of July, 1845. The *nisi prius* record was made up, stating only that the defendant was summoned to
 *60] *answer the plaintiff by virtue of a writ issued on the 15th of August, 1844; and, on its production at the trial, the plaintiff obtained a verdict. The court held, that the provisions of the statute 2 W. 4, c. 39, s. 10, had not been complied with, and made absolute a rule to amend the *nisi prius* record, by stating the continuances according to the truth, at the costs of the plaintiff: and that, where a writ issued within six years after the cause of action accrued has not been duly continued, pursuant to the 2 W. 4, c. 39, s. 10, the defendant is not bound to plea such non-continuance specially, but may take advantage of it under the general plea, that the cause of action did not accrue within six

(a) Which enacts, "that no writ issued by authority of this act shall be in force for more than four calendar months from the date thereof, including the day of such date, but every writ of summons and *capias* may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith: provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus* and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum endorsed thereon or subscribed thereto, specifying the day of the date of the first writ; and return to be made in bailable process, by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be."

See *M'Kellar v. Reddie*, 5 Scott, N. R. 192.

years next before the commencement of the suit,—*the last writ which is served, being, for this purpose, the commencement of the suit.* That is an authority in point, except that the second writ there was a *pluries*, here a *distringas*. The record in this case should have stated that the defendant was summoned by virtue of a writ issued on the 1st of November, 1848. [MAULE, J. You contend that the *distringas* is to be treated as if it had been an *alias* or a *pluries* summons?] Yes. [MAULE, J. The *distringas* is, to compel appearance to the writ of summons. Where the plaintiff obtains a *distringas*, it is the same as personal service of the writ of summons.] That would be so, but for the 10th sect. of the uniformity of process act. [CRESSWELL, J. That section applies only to writs issued in continuation of former writs.] A *distringas* may issue in continuation of process to save the statute of limitations: *Ray v. Dow*, 5 Dowl. P. C. 310. [CRESSWELL, J. That was with a view to outlawry.] The 10th section clearly applies to writs of *distringas*: the words are general.

*MAULE, J. The writ of summons in this case issued on the 8th of August, 1848, under the authority of the uniformity of process [*61 act, which, in s. 1, provides that all personal actions shall be commenced by writ of summons. The 10th section enacts, “that no writ issued by authority of this act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date, but every writ of summons and *capias* may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith: provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus*, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum endorsed thereon, or subscribed thereto, specifying the day of the date of the first writ.” The question here is, whether, the action having been commenced by a writ truly stated in the issue, the issue is irregular for not stating the *distringas*. It is true that the action was commenced as is alleged, and that the defendant was summoned. The writ of summons is to be served within four calendar months. If the plaintiff is unable to serve it within that period, he may, upon satisfying the court, or (in vacation) a judge, that due attempts have been made to effect the service, obtain a *distringas*, and may *afterwards, upon taking the [*62 proper steps, enter an appearance for the defendant as upon a

personal service. The appearance, when entered, supposes the action to have been commenced by the writ of summons, which is the foundation of the distringas. It is perfectly competent to a defendant to appear to a writ which has not been personally served, but merely left at his dwelling-house. He may treat that as a served writ: or the plaintiff may, by adopting the course above adverted to, make a writ that has not been personally served equivalent to one which has. I therefore think this is a perfectly clear case. It would be a most strange and anomalous thing, if it were otherwise. The plaintiff having done all that is provided by the act as having the effect of service of the writ of summons, it would be singular if he were to be barred earlier than he would have been if the defendant had not kept out of the way. The 10th section is wholly inapplicable to a proceeding by distringas. If it were, then the distringas must issue within a month after the expiration of the former process; which would be quite a new practice. I think there is no ground for the motion.

The rest of the court concurring,

Rule refused.

*63]

*HIGGS v. SCOTT. Jan. 16.

A., tenant to B., received notice from C., a mortgagee of B.'s term, that the interest was in arrear, and requiring payment to her, B., of the rent then due. A., notwithstanding this notice, paid the rent to B. (under an indemnity which turned out to be unauthorized), and was afterwards compelled, by distress, to pay the amount over again to C.:—Held, that the payment to B. was a voluntary payment, with full knowledge of the circumstances, and therefore not recoverable back in an action for money had and received.

At the trial, in support of a special count founded upon the indemnity, the plaintiff proved that one H. was B.'s general attorney; and he then proposed to prove that H., as such attorney, had given the indemnity:—Held, that this evidence was not admissible, in the absence of proof of H.'s authority to make such a contract for his client.

THE plaintiff held premises as tenant from year to year to the defendant. After the commencement of the tenancy, the defendant mortgaged her term in the premises to a Mrs. Hardy. The interest being in arrear, the mortgagee, in the beginning of the year 1848, gave the plaintiff notice not to pay his rent to the defendant. Upon receipt of this notice, the plaintiff went with one Hawkins, who collected the defendant's rents, to one Hodgkinson, whom Hawkins represented to be the defendant's attorney, and gave him notice of Mrs. Hardy's claim. In consequence of what passed upon that occasion, the plaintiff, on the 18th of February, 1848, paid Hawkins the amount of two quarters' rent, less the property-tax. After this, a distress was put in upon the plaintiff's premises, under which the plaintiff was compelled to pay the two quarters' rent over again to Mrs. Hardy, the mortgagee. The present action was brought to recover back the money so paid—the first count being founded upon an indemnity given by Hodgkinson in the defendant's name, the second for money had and received.

In support of his case under the first count, the plaintiff called Hodgkinson; but the lord chief justice, before whom the cause was tried, said he would allow the plaintiff to prove notice given of Mrs. Hardy's claim to *Hodgkinson, but not that he had given the indemnity. The plaintiff then relied upon the facts above stated, as entitling him [*64 to recover back as money had and received, the two quarters' rent he had paid to the defendant after the date of the notice.

On the part of the defendant, it was objected,—first, that this was, in effect, an attempt to try a question of title in an action for money had and received;—secondly, that the payment having been voluntarily made, with full knowledge of the facts, the plaintiff could not recover it back.

A verdict having been found for the defendant, with leave to the plaintiff to move to enter a verdict for 19*l.* 2*s.* 6*d.*, if the court should be of opinion that the evidence as to the indemnity was improperly rejected, or that the plaintiff was entitled to recover under the second count,

Byles, Serjt., now moved accordingly. The two leading cases that show title not to be triable in an action for money had and received, are, *Lindon v. Hooper*, Cowp. 414, and *Cunningham v. Lawrents*.^(a) Both, however, were cases where the question of title arose between the litigant parties. The case which comes the nearest to the present, is *Newsome v. Graham*, 10 B. & C. 234, 5 M. & R. 64, where a tenant, having paid rent to A., was ejected at the suit of a third person, who afterwards recovered from him mesne profits for the period in respect of which he had paid rent to A.: and it was held that the tenant might recover back that rent from A., in an action for money had and received, he not having set up any title to the premises at the trial. Lord TENNERDEN, delivering the *opinion of the court, there says: "We are all clearly of opinion that the action for money had and re- [*65 ceived is maintainable. It appears that the plaintiff had, from time to time, paid rent to the defendants for certain premises which he held of them; that it afterwards turned out that the defendants had no title: the plaintiff was ejected, and compelled to pay the mesne profits for the time during which he had held of the defendants; and this action was brought to recover back the rent which he had paid to them. The objection was, that title to land could not be tried in an action for money had and received.^(b) That is true; but here, there was no trial of title. It had been previously ascertained that the defendants had no title whatever to this land, in respect of which the plaintiff had paid rent to them; and the defendants did not, at the trial of this cause, claim to have any title. From the short note of the nisi prius case of *Cunningham v.*

(a) Cor. WILSON, J., Worcester Spring Assizes, 1788, Bac. Abr. title *Assumpsit* (A), 5th and 6th editions, vol. 1, p. 260, 7th edit. p. 344.

(b) Vide *Young v. Grove*, 4 Man. Gr. & S. 668, 9.

Lawrents, in Bacon's Abridgment, it may be inferred that the defendant claimed title to the land at the very time when the action of assumpsit for the rents received was brought. In *Lindon v. Hooper*, the right of common was in dispute at the time when the action for money had and received was brought to recover back the money paid for the release of the cattle; the defendant, who had distrained the plaintiff's cattle, agreed to return the money if the plaintiff should make out his right, and the action was brought to try the right. In this case, it did not appear that the defendants, either at the time when this action was brought, or at the trial, claimed to have any title to the land. That being so, we are of opinion that there should be no rule." Here, no title was set up by the defendant at the trial. [WILDE, C. J. The defendant was content to rely on the weakness of the plaintiff's *66] *case.] The record in this case would not be evidence either for or against Mrs. Hardy on any future occasion. No case is to be found where the circumstance of a third person's title incidentally arising, has been held to oust a party from this form of action. [MAULE, J. In *Knibbs v. Hall*, 1 Esp. N. P. C. 84, it was held, that, where a party threatened with a distress for rent, pays money when he might legally have defended himself, it is not a payment by compulsion, and can neither be recovered back nor set off against another demand. The ground upon which the plaintiff was held entitled to maintain money had and received, in *Parker v. The Great Western Railway Company*, 7 M. & G. 253, 7 Scott, N. R. 835, was, that, as the party could not do without his goods, the payment was made through necessity and the urgency of the case.] In *Brisbane v. Dacres*, 5 Taunt. 143, the money was paid, with knowledge of the facts, but, under a mistake as to the law, to one claiming it as a right; and it was held not to be recoverable back; but, there it is put upon the ground of there being nothing against conscience in the defendant's retaining it. Here, the retention of the money by this defendant, is clearly against conscience. In *Kelly v. Solari*, 9 M. & W. 54, PARKE, B., says: "I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid, if it had been known to the payer that the fact was untrue, an action will lie to recover it back; and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position, —that a person so paying is precluded from recovering, by laches in not availing himself of the means of knowledge in his power,—seems, *67] from the cases cited, to have *been founded on the dictum of Mr. Justice BAYLEY, in the case of *Milnes v. Duncan*, 6 B. & C. 671, 9 D. & R. 731; and, with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intention

ally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it: but, if it is paid under the impression of the truth of a fact which is untrue, it, may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case, the receiver was not entitled to it, nor intended to have it." That case is recognised, and the principle of it somewhat extended by this court, in *Bell v. Gardiner*, 4 M. & G. 11, 4 Scott, N. R. 621, 1 Dowl. N. S. 683. It was there held, that a negotiable security given by a party in satisfaction of a liability from which he was discharged in law,—in ignorance of the facts which constituted such discharge,—cannot be enforced against him, though he may have had the *means* of knowing those facts. [MAULE, J. Where the party paying the money has been guilty of laches, he cannot recover it back: *Skyring v. Greenwood*, 4 B. & C. 281, 6 D. & R. 401, 1 C. & P. 517. There, the paymaster of a military corps had given credit in account to an officer in that corps, from the 1st of January, 1817, to the 5th of November, 1820, for certain increased pay erroneously supposed to be granted by a general order of the 27th of August, 1806, to an officer of his situation, and a statement of that account was delivered to the officer in 1821. In December, 1816, the paymasters were informed by the *board of ordnance that the increased pay granted by the order of 1806, [*68 would not be allowed to persons in the situation of the officer in question. The paymasters did not communicate this information to the officer till 1821, and subsequently to that time they continued to receive his pay. It was held, in an action brought by his personal representative to recover such pay, that it was not competent to the paymaster to retain any of such sums of money on account of the sums which they had credited him for by way of increased pay, and which they had allowed him to consider his own for so long a period of time. [WILDE, C. J. Several cases of that sort arose under Howard & Gibbs's bankruptcy.] It is clear, that, the plaintiff paid the money upon the faith of the defendant's representation that she was entitled to receive it. He did not intend that the defendant should have it whether she was entitled or not. It is true the plaintiff had the means of knowledge: but there were counter-representations. [WILDE, C. J. Of fact, or of law?] Of fact. [CRESSWELL, J. Is that so?] It is submitted that it is. The case of laches, that has been suggested, does not apply. The plaintiff paid the money upon the representations of Hodgkinson, who represented himself as, and who was in fact, the attorney of the defendant. In that view, Hodgkinson's acts and representations were evidence against the defendant. [WILDE, C. J. The difficulty I feel, is, whether the objection is not removed by Hodgkinson's affirmatively stating that he had no au-

thority from the defendant to give the indemnity.] Suppose he had no instructions, still he was her attorney. [MAULE, J. *Prima facie*, the evidence was inadmissible; and no ground was laid for admitting it. WILDE, C. J. The payment was not made under any mistake either of fact or of law. The plaintiff paid the money after notice; and the facts *69] turned out to be as *the notice stated.] The payment was induced by a misrepresentation. [WILDE, C. J. There was no evidence that the defendant made any representation at all. She demanded the rent as of right, knowing that the mortgagee had given the plaintiff notice of her claim.] The plaintiff never intended to make a gift of this money to the defendant. [MAULE, J. He meant to pay it under an indemnity: he should have taken care to get one that he could enforce.]

CRESSWELL, J. I am of opinion that there is no ground for impeaching the decision of the lord chief justice as to the rejection of Hodgkinson's evidence. Seeing the purpose for which it was tendered, viz. to prove a contract, to make which there was no evidence of Hodgkinson's authority, it was properly rejected.

Then, as to the other point,—the plaintiff, when he paid the money, knew all the facts. He was informed of them; and there was nothing to show he had not received correct information. When a party is told that certain deeds have been executed, he knows the fact, although he does not see the deeds. The whole case on the part of the plaintiff, was, that he knew the fact of the mortgagee's claim; and therefore he asked for an indemnity, though he did not, unfortunately for him, get an effectual one. He paid the rent as a thing he was bound to pay, indicating no intention to reclaim it. There was no misrepresentation of the facts, no fraud on the part of the defendant in receiving the money, and consequently no ground upon which the plaintiff can be entitled to recover it back.

V. WILLIAMS, J. I am of the same opinion. I am not disposed to throw any doubt upon the case of *Kelly v. Solari*, confirmed, as it is, by *Bell v. Gardiner*. But I think the present case falls within the ordinary rule, *that money paid with full knowledge of all the circumstances, cannot be recovered back in an action for money had and received. *70]

MAULE, J. I am of the same opinion. That the payment was made with full knowledge of all the facts on both sides, was, I think, strongly evidenced by the receipt that was given.

WILDE, C. J. The general result of the evidence in this case, is, that the defendant has received from the plaintiff a sum of money which she was not entitled to receive: and, in such a case, one would look very anxiously to see if the law would not warrant his recovering it back. But it is of infinitely more importance that general principles should be adhered to. I must confess I can see no foundation for the plaintiff's

claim. The recovery back of money once parted with, is always attended with difficulty.

With respect to the evidence,—what passed with Hodgkinson, was admitted down to the point at which it tended to prove a contract. It was then objected that Hodgkinson had no authority from his client to enter into a contract of indemnity for her. Upon that, the question for my decision was, whether or not there was evidence of any authority in him to contract for the defendant. I think there was not.

As to the other part of the case, it was an extremely simple one. The plaintiff is tenant to the defendant. A third person gives notice of a claim adverse to the defendant, stating the grounds of her claim minutely and correctly, viz. that the premises have been assigned to her by way of mortgage, and that the interest is in arrear. The landlady insists that *she* is entitled to the rent. Of what is the plaintiff ignorant? It does not appear that any misrepresentation of fact was made by the defendant. The plaintiff yields to the defendant's claim [*71 of right, and pays her the money. It is, therefore, the simple case of a notice of adverse claims, to one of which the plaintiff elects to give the preference. The case, therefore, clearly falls within the general principle,—that money paid with full knowledge of all the facts, cannot be recovered back.

Rule refused.

DEARIE and Others, Assignees of J. HUGHESDON, and A. MAC-KAY, Bankrupts, v. R. and J. HENDERSON. Jan. 20.

The plaintiffs, as assignees of H. & M., delivered a declaration, the first two counts being in trover for a ship and cargo, alleged in the first count to have been in the possession of H., and, in the second, as having been in the possession of the assignees.

The third count stated that H., before his bankruptcy, being sole owner of a ship, executed a deed-poll under seal, empowering the defendants to sell the ship, and that H. & M. sent the deed-poll to the defendants for the purpose of securing them in respect of the acceptance by them of certain bills of exchange drawn upon them by H. & M.; that the defendants received the deed-poll with full notice and for the purpose aforesaid; but that they refused to accept or to pay the bills; and afterwards sold the ship, under colour of the deed-poll, before the bankruptcy of H. and M.

The fourth count stated that H., before his bankruptcy, being sole owner of a ship, executed a deed-poll under seal, of the like tenor and effect as the deed-poll mentioned in the last preceding count; that H. & M., before either of them became bankrupt, wrote a letter to the defendants, instructing them not to sell the ship; that the last-mentioned deed-poll and letter were delivered to the defendants, who held the deed-poll subject to the instructions contained in the letter; yet that the defendants, before the bankruptcy of H. and M., and contrary to the terms of the letter, sold the last-mentioned ship by a bill of sale executed by the vendors before, but completed by the purchasers after, the bankruptcy of H. and M. :—

A judge at chambers having made an order "that the plaintiffs elect between the first and third, and the second and fourth counts, or be at liberty to amend the first and second counts, by confining the same to the cargo,"—on the ground that the counts were apparently founded upon the same principal subject-matter of complaint, within the rule of Hilary term, 4 W. 4, r. 5,—the court declined to rescind or vary his order.

THE first count of the declaration in this case was in trover, for a ship and cargo in the possession of Joseph Hughesdon the younger, and alleged a conversion by the defendants before Hughesdon's bankruptcy.

*72] *The second count was also in trover, for a ship and cargo in the possession of the plaintiffs as assignees of Joseph Hughesdon, and alleged a conversion by the defendants after the bankruptcy of Hughesdon.

The third count stated, that before the said Joseph Hughesdon became bankrupt, to wit, on, &c., he, being then lawfully possessed, and sole registered owner, of a ship called the *Sir Robert Seppings*, executed a deed-poll under seal [which was set out], empowering the defendants to sell the ship and convey her to the purchaser or purchasers, and that the said Joseph Hughesdon and A. Mackay sent and delivered the deed-poll to the defendants for the purpose of securing the defendants in respect of the acceptance by them of eighteen bills of exchange, for a large amount, to wit, 14,955*l.* 15*s.* 6*d.*, drawn by the said J. Hughesdon and A. Mackay, upon the defendants, and payable to their order, and endorsed by the said J. Hughesdon and A. Mackay, and the defendants received the said deed-poll with full notice, and for the purpose aforesaid; that, although the said bills were all presented to the defendants, before any of them became due, by the respective endorsers and holders thereof, for acceptance by the defendants, the same were not, nor was either of them, at any time, accepted or paid by the defendants, but were respectively refused acceptance, and dishonoured by the defendants, and the said bills were then duly protested for non-acceptance, of which *73] the respective *holders gave notice to the said J. Hughesdon and A. Mackay, and required them to pay the amounts of the said bills respectively; yet that the defendants, after such dishonour, and contrary to the purpose for which they held the said deed-poll, and before the bankruptcy of the said J. Hughesdon and A. Mackay respectively, sold the said ship, under colour of the said deed-poll, by a bill of sale executed in the name of the said J. Hughesdon, by R. Henderson (one of the defendants), before the bankruptcy, and completed by the purchasers after the bankruptcy, of the said J. Hughesdon and A. Mackay respectively, whereby the plaintiffs, as assignees of the said J. Hughesdon and A. Mackay respectively, had been deprived of the possession of the said ship, and had lost the freight of her cargo, to wit, 10,000*l.*, which, but for such loss of possession, would have been payable to them as assignees of the said J. Hughesdon and A. Mackay.

The fourth count stated, that the said J. Hughesdon, before his bankruptcy, being the sole registered owner of a ship, executed a deed-poll under seal, of the like tenor and effect as the deed-poll mentioned in the last preceding count; and that the said J. Hughesdon and A. Mackay, before either of them became a bankrupt, wrote a letter to the defendants, instructing them that they did not wish the said last-mentioned ship to be sold; that the last-mentioned deed-poll and letter were delivered to the defendants, who held the said deed-poll subject to the instructions contained in the said letter; yet that the defendants, before the

bankruptcy of either the said J. Hughesdon or A. Mackay, and contrary to the terms of the said letter, sold the last-mentioned ship, by a bill of sale, executed by the vendor before, but completed by the purchasers after, the bankruptcy of the said J. Hughesdon and A. Mackay,—averring damage as in the third count.

*On the 16th instant, COLTMAN, J., under the rule of Hilary term, 4 W. 4, r. 5, 6, made an order “that the plaintiffs elect be- [*74
tween the first and third, and second and fourth counts of their declaration, or be at liberty to amend the first and second counts, by confining the same to the cargo, and that, in the mean time, all further proceedings be stayed.”

Peacock now moved to set aside or to vary that order. The question is, whether the first and third, and second and fourth counts, respectively, are in “apparent violation” of the 5th rule of Hilary term, 4 W. 4, which provides that “several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each.” The first count is, trover for a ship and cargo in the possession of the bankrupts, alleging a conversion before the bankruptcy; and the third is a special count in case against the defendants for improperly selling a ship under circumstances to which their authority to sell did not extend. The question is, whether, upon such a state of facts, trover would be the proper remedy, or whether the plaintiffs would not be entitled to recover a greater amount under the special count, than under a count in trover. In *Williams v. Archer*, 5 Man., Gr. & S. 318, it was held, that, in detinue for scrip certificates, which had been re-delivered after action brought, the jury might take as the measure of damages, the difference between the value of the scrip at the time of the demand and refusal, and the value at the time of the re-delivery. [MAULE, J. To sustain the third count, the plaintiffs must show a conversion.] It may be that the same evidence that will prove the third count, will also prove the first: but do they so clearly appear to be founded on the same subject-matter of complaint as to *fall within the rule? In *Gilbert v. Hales*, (a) the declaration contained twenty-five counts: the [*75
first fifteen were on bills of exchange drawn at Paris: the next five, which related to the same bills, were special counts founded on the law of France: and the last five were on a special agreement to pay the bills, in consideration of the plaintiff procuring their discount. Application having been made to strike out the last set of counts,—it was held that they were not in apparent violation of the rule. And ALDERSON, B., said: “The question is, are the three sets of counts in *apparent* violation of the rule, as being substantially for the same cause of action. In this case, the first set of counts is founded on the law-mèrchant, the second on the law of France, and the third on a contract altogether independent of and collateral to the two former sets of counts. These

(a) 2 D. & L. 227. And see *Fagan v. Harrison*, 4 Man., Gr. & S. 910.

counts do not, therefore, appear to be in violation of the rule, though the fact *may be*, and *probably is*, that there was but one contract." In the present case, it is impossible to say that the plaintiffs mean to rely on the same act of conversion in support of the first and the third counts. [CRESSWELL, J. The first and third counts here are evidently founded on the same subject-matter of complaint.] To constitute a violation of the rule, that similarity, or, rather, that identity, must be apparent on the face of the record. [CRESSWELL, J. That cannot be the true criterion. You cannot, in many cases, see from the record whether the two counts are the same or different: for instance, in the case of a contract alleged in one count with, and in another without, a condition.] One test is, the power of amendment under the 3 & 4 W. 4, c. 42, s. 23: *76] would that apply here? The first and fourth counts *respectively allege the conversion and sale to have taken place *before*, the second and third counts *after*, the bankruptcy. Upon the fourth count, a question will arise as to what was the effect of the letter of instructions with reference to the deed-poll. The evidence that would be required to support that count, clearly would not sustain a count in trover.

WILDE, C. J. By the 5th rule of Hilary term, 4 W. 4, several counts are not to be allowed, "unless a distinct subject-matter of complaint is intended to be established in respect of each." Therefore, "counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstance only, are not to be allowed." The substantial complaint here is, that the defendants sold the ship in question, having an apparent, but not a real, authority so to do. What is that but a conversion? The subject-matter of complaint is clearly the same in all the counts, viz. a wrongful sale of the ship. The sale was complete before the bankruptcy: the execution by the vendees amounts to nothing. I think the order of my brother COLTMAN was quite right.

MAULE, J. I also think the order in question was properly made. Looking at the declaration with the eye of a pleader, I have no hesitation in saying, that the first and third, and second and fourth counts, respectively, appear to be founded on one and the same principal matter of complaint; and that therefore the defendants are entitled to the undertaking provided for by the 6th rule, which declares, that, "where more than one count, plea, avowry, or cognisance shall have been used in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the counts, *77] pleas, *avowries, or cognisances are founded on the same subject-matter of complaint, or ground of answer or defence, for an order that all the counts, pleas, avowries, or cognisances introduced in violation of the rule, be struck out at the cost of the party pleading; whereupon the judge shall order accordingly, unless he shall be satisfied, upon

cause shown, that *some distinct subject-matter of complaint is bona fide* intended to be established in respect of each of such counts, or some distinct ground of answer or defence in respect of each of such pleas, avowries, or cognisances; in which case, he shall endorse upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, avowries, or cognisances mentioned in such application, which shall be allowed."

CRESSWELL, J., and V. WILLIAMS, J., concurred. Rule refused.

SMALLCOMBE, the Younger, v. WILLIAMS. Jan. 25.

The venue having been changed, at the instance of the defendant, upon the common affidavit, from Gloucestershire to Bristol, and restored to Gloucestershire without an undertaking to give material evidence there,—the court refused to restore it to Bristol, upon an affidavit that the cause of action arose wholly in the latter place, that the witnesses the defendant would produce at the trial were *very numerous*, and all resident in Bristol, and that the plaintiff was a person in indigent circumstances, and unable to pay costs if she failed to obtain a verdict.

ASSUMPSIT for breach of promise of marriage. Plea, non assumpsit. The promise was alleged to have been made on the 1st of January, 1847; the declaration was delivered on the 5th of December, 1848; and the plea, on the 16th.

The venue, which was originally laid in Gloucestershire, was changed by the defendant to Bristol, upon the usual affidavit, that the cause of action (if any) **arose* in that city, and not elsewhere. On the [78 22d of December, V. WILLIAMS, J.,—without any affidavit by the plaintiff to support the application, and without requiring her to enter into the ordinary undertaking to give material evidence there,—made an order restoring the venue to the county of Gloucester.

Cole,—upon affidavits stating, that the plaintiff's cause of action (if any) arose in the city and county of Bristol, and not in the county of Gloucester, or elsewhere out of the city and county of Bristol; that the defendant was married, aged fifty-eight years, and had six children; that the witnesses he would produce at the trial were *very numerous*, and all except two lived in the city and county of Bristol; that such two excepted persons did not live in or near the county of Gloucester; that the city of Gloucester is distant thirty-four miles and upwards from Bristol; that the plaintiff was a person in indigent circumstances, and wholly unable to pay the costs if the verdict went against her; that an action was brought in the Tolzey (vide 1 M. & G. 3) court of the city and county of Bristol, and tried in the month of July, 1847, the circumstances of which were closely connected with this cause; (a) that the present plaintiff's attorney was the attorney of the plaintiff in such former action; that, at such trial, the present plaintiff and her brother were examined, and were the principal witnesses: that they both resided, and still con-

(a) An action against the defendant for the seduction of the now plaintiff.

tinued to reside, in Bristol; that the plaintiff might have brought her action in the said Tolzey court, which is a court of record, in which trials are held four times a year, at the time of the quarter sessions, *79] before the Recorder of Bristol, and in which *court damages to any amount might be recovered; and that, if this cause were tried at Gloucester, the expenses would greatly exceed the expenses of trying at Bristol,—now moved to set aside the order of V. WILLIAMS, J., and to restore the venue from Bristol.

WILDE, C. J. I do not think your affidavit sufficient. You are bound to show some manifest inconvenience that would result from trying the cause at Gloucester. Your affidavits do not state the number of your witnesses; and, non assumpsit being the only plea, there cannot possibly be many necessary. Besides, Gloucester is now only about an hour or an hour and a half's journey from Bristol,

The rest of the court concurring,

Rule refused.

TOLSON v. The Bishop of CARLISLE, M. B. DYKES, Widow, and J. B. DYKES, Clerk. Jan. 31.

In a local action, a suggestion to try the cause in an adjoining county cannot be granted before issue joined.

THIS was an action of *quare impedit*, wherein the plaintiff claimed the advowson and the immediate right of presentation to the vicarage of Bridekirke, in the county of Cumberland.

Manning, Serjt., moved to change the venue from the county of Cumberland to the county of Lancaster, on the ground of the existence in the former county, of undue influence and prejudice against the plaintiff's claim. The affidavits upon which the motion was founded, stated, *80] amongst other things, that many *persons of property and influence in the county (and amongst them the lord lieutenant) were in possession of burgages, tithes, and tenements, which the plaintiff claimed under the same title which was in issue in this cause; and that, upon a former occasion, the plaintiff had, under the advice of counsel, withdrawn the record in an action of ejectment brought for trial, upon the same title, at the assizes at Carlisle, in consequence of the high sheriff having at a public dinner at the Bush inn, in that city, proposed the health of the defendant Dykes, and "success to his cause." [CRESWELL, J. When did that occur?] In the year 1825. [MAULE, J. Does it appear that any of the gentlemen who were present at that convivial meeting are now living?] It is enough for the present purpose that the spirit survives. The affidavits disclose the existence of a very general feeling amongst the freeholders of the county adverse to the plaintiff's claim, and show strong grounds for the belief that a fair and impartial trial cannot be had in the county of Cumberland. [WILDE, C. J. Your affidavits d:

not state that issue is joined ; your motion, therefore, is premature.] It is not absolutely necessary that issue should be joined. In *Dowler v. Collis*, 4 M. & W. 531,(a) it was held, that, although the general rule is, that a motion to change the venue on special grounds cannot be made until after issue joined, yet, if the pleadings and facts of the case are such that the court cannot fail to see what the issues joined must be, the application may be granted before issue joined. [MAULE, J. This being a local action, a *suggestion* must be entered, to warrant a trial in another county ; and that cannot be done until after issue joined.(b)] *A rule may be granted *quia timet*,—to enter the suggestion when [*81 issue shall have been joined.

WILDE, C. J. That would be suggesting something contrary to the fact. We clearly cannot entertain the application at this stage of the cause. The rest of the court concurring, Rule refused.

(a) S. C. (*per nom.* Dowler v. Caller), 7 Dowl. P. C. 55.

(b) See Archbold's Practice, 7th edit., by Chitty, Vol. I. p. 282, Vol. II. p. 1172.

SANDERSON v. DOBSON.

Testator, by his will,—reciting that he had contracted with A. for the sale of a freehold messuage at M., but that he had never executed any conveyance thereof to him,—devised the same to B. and C., their heirs and assigns, in trust, on receipt of the purchase-money, to enable them to convey to A. He then gave a leasehold estate to his two sisters, “their heirs, executors, administrators, and assigns, for and during the term of their natural lives, or the lives of the several persons for whose lives the same was held, and the life of the longest liver of them, without impeachment of waste.” And, after the death of one of the sisters, he gave the whole of his said “leasehold estate” to the survivor, her heirs, &c., absolutely.

The will then proceeded as follows:—“I give unto my said sisters my silver-hafted knives and forks, and my silver table-spoons, equally to be divided between them ; and I give all the rest of my household furniture, books, linen, and china (except as hereinafter mentioned), goods, chattels, estate, and effects, of what nature or kind soever, and wheresoever the same shall be at the time of my decease, unto the said B. & C., their executors, administrators, and assigns, in trust, as soon as conveniently may be, to sell and dispose of the same, and to apply the money by such sale arising, towards payment of my debts, &c. : I give and bequeath all my ready money, and the money arising by sale of my said premises at M., to be received by my said trustees, securities for money, and all other sum or sums of money that may be due and owing to me at the time of my decease, unto my said sisters,” &c. And B. and C. were appointed executors:—

Held, that the trustees, B. & C., took the reversion in fee in other lands of which the testator, at the time of making his will (made before 1838), was seised for life, with contingent remainders which failed, with the reversion in himself, in fee.

THE following case was sent by the Master of the Rolls (Lord LANGDALE), for the opinion of this court:—

Thomas Stapylton, late of Leyburn, in the county of York, deceased, duly made, signed, and published his *last will and testament, in writing, bearing date the 4th of October, 1808, and which was [*82 attested as by law was required for passing real estate by devise, and, so far as the same is material to be here stated, was in the words following:—

"Whereas, I have lately contracted with Thomas Wray, of Aggelthorp, yeoman, for the sale to him of my freehold messuages, tenements, or dwelling-houses situate at Middleham, in the said North Riding, with the appurtenances thereunto belonging, at or for the price or sum of 240*l.*, but have never made or executed any conveyance thereof to the said Thomas Wray: therefore, I give and devise all the said messuages, tenements, and dwelling-houses at Middleham aforesaid, unto and to the use of John Robson and Jonathan Sleigh, both of Leyburn aforesaid, gentlemen, their heirs and assigns,—in trust to enable them, on the receipt of the purchase-money, or so much thereof as I have not already received, to convey and assure the same to the said Thomas Wray, his heirs or assigns, or as he or they shall direct or appoint, and the receipt of them the said John Robson and Jonathan Sleigh shall be a sufficient discharge to the said Thomas Wray, his heirs and assigns: And I give and devise all my leasehold *estate* called Skelton Coat, with the rights and appurtenances thereunto belonging, situate, lying, and being near Bellerby, in the parish of Speninthorne, in the said North Riding, now in the tenure and occupation of Christopher Tidyman, unto my dear sisters Margery Stapylton and Martha Stapylton, spinsters, their heirs, executors, administrators, and assigns, for and during the term of their natural lives, or the lives of the several persons for whose lives the same are held, and the life of the longest liver of them (a) (subject to the yearly rent payable *83] thereout), without impeachment of *waste*: and, from and after the death of either of my sisters Margery Stapylton and Martha Stapylton without lawful issue, then I devise the whole of my said leasehold *estate* to the survivor of them, her heirs, executors, administrators, and assigns, absolutely, for ever: I give unto my said sisters my silver-hafted knives and forks, and my silver table-spoons, equally to be divided between them; and I give all the rest of my household furniture, books, linen, and china (except as hereinafter mentioned), goods, chattels, *estate*, and effects of what nature or kind soever, and wheresoever the same shall be at the time of my decease, unto the said John Robson and Jonathan Sleigh, their executors, administrators, and assigns, in trust, as soon as conveniently may be, to sell and dispose of the same, and to apply the money by such sale arising, towards payment of my debts and the legacy hereinafter mentioned, and to pay the overplus (if any) to my said sisters Margery Stapylton and Martha Stapylton: I give and bequeath all my ready money, and the money arising by sale of my said premises at Middleham to be received by my said trustees, securities for money, and all other sum or sums of money that may be due and owing to me at the time of my decease, unto my said sisters and my brother Ralph Stapylton, of Leyburn aforesaid, Esquire, to be divided equally between them, share and share alike, thereout to pay my funeral expenses."

(a) *Quare, of the sisters, or of cettoux a que vive?*

And, after various specific bequests of furniture and chattels, the said will proceeded as follows:—

“I constitute my worthy and much-esteemed friends, the said John Robson and Jonathan Sleigh, executors in trust of this my last will and testament; and I hereby require of them to pay the sum of 2s. a-piece to every person in Leyburn whom they may deem fit and proper objects of charity,—which money I desire may be paid as soon after my decease as conveniently may be: And I give to them, the said John Robson and Jonathan *Sleigh, the sum of 10*l.* 10*s.* each, of which I beg their [*84 acceptance as small acknowledgments for the trouble they may have in the trusts and executorship of this my will: And I declare that they shall not be answerable or accountable the one for the other of them, nor for more money than they shall actually receive, and by no means for involuntary losses; and that they, their respective heirs, executors, administrators, and assigns, shall be allowed all their costs, charges, damages, and expenses, to be occasioned by the execution of the trusts hereby in them reposed: And I do revoke all my former wills.”

The testator was, at the time of making his aforesaid will, and continued down to and at the time of his death, seised of a moiety of certain freehold messuages, lands, and hereditaments, situate at Leyburn, Bellerby, and Harnby, in the county of York, for an estate for his life, with contingent remainders which failed, with the reversion to himself in fee-simple.

The testator died on the 12th of October, 1808, without having revoked or altered his said will.

The question for the opinion of the court was,—whether, under the above-stated will of Thomas Stapyhton, the testator, any, and what, estate or interest in the hereditaments at Leyburn, Bellerby, and Harnby, passed to John Robson and Jonathan Sleigh, the devisees in trust therein named.

Copies of the respective wills of Thomas Stapyhton the father, and the said Thomas Stapyhton the son, accompanied the case,—to which the court were requested to refer, if they should think proper.

John Hodgson (with whom was *S. F. Williams*), for the plaintiff. The question in this case is, whether real estate passed by the word “estate” in the following clause of the will of Thomas Stapyhton,—“I give unto my said sisters my silver-hafted knives and forks, and [*85 *my silver table-spoons, to be equally divided between them; and I give all the rest of my household furniture, books, linen, and china, except as hereinafter mentioned, *goods, chattels, estate, and effects, of what nature or kind soever*, and wheresoever the same may be at the time of my death, unto the said John Robson and Jonathan Sleigh, their executors, administrators, and assigns, in trust, as soon as conveniently may be, to sell and dispose of the same, and to apply the money by such

sale arising towards the payment of my debts and the legacy hereinafter mentioned, and to pay the surplus, if any, to my said sisters." This case was sent for the opinion of the court of Exchequer; and that court came to the conclusion that the real estate did *not* pass.^(a) But there is one very material case, decided in the privy council, to which the attention of that court was not called upon that occasion. The opinion of the court has long been, that the word "estate" *prima facie* passes real estate,—with this qualification, that, to justify that construction, it must appear that the other words of the will suffice to convey all the testator's personal estate. The word "estate," it will in such case be assumed, was not put in without purpose. Formerly the rule *noscitur a sociis*, prevailed; but a different view was propounded by Lord HARDWICKE in *Tilley v. Simpson*, 2 T. R. 659^(b). There, the testator, after declaring that he intended to dispose of *all his worldly estate*, and making several devises to different persons, gave and bequeathed *all the rest and residue of his money, goods, chattels, and estate whatsoever*, to his nephew A. B. The question was whether a beneficial interest in a real estate, not before disposed of, would pass to the nephew by this devise. Lord HARDWICKE^{*86]} was of opinion that it would. He said—"Where the *court hath restrained the word *estate* to carry personal estate only, hath been where it hath appeared that it was the intention of the testator it should be so understood: as, where it hath stood coupled with particular descriptions of part of the personal estate, as, a bequest of all my mortgages, household goods and *estate*, in which the preceding words are not a full description of the personal estate: he did not know any of those cases where the preceding words were sufficient to pass the whole personal estate. If the testator had said, '*all the rest and residue of my personal estate and estates(b) whatsoever*,' a real estate would have passed. This bequest amounts to the same, for the word *chattels* is as full a description of the personal estate as the word *personal*. Therefore, when he hath used words comprehending all his personal estate, and then makes use of the word *estate*, that word will carry a real estate. The word *whatsoever* is used here; which is the same as if he had said, of whatever kind it be; and, if that had been the case, it would most certainly have carried the real estate. The case of *Tirrel v. Page*, 1 Ch. Cas. 262, is very material to the present question, and I think cannot be distinguished; there, the gift was of '*all the rest and residue of my money, goods, and chattels, and other estates whatsoever*, I give to J. L.' The only difference in the case is, that there is the word *other*, which I do not think can distinguish it. If it had been *all the rest and residue of my household goods and mortgages, and all other estate*, I do not think that would have carried the real." It is not necessary to show

(a) See *Sanderson v. Dobson*, 1 Exch. 141.

(b) In apparent intention, no less than in grammatical construction, the adjective "personal" appears to connect itself with both the succeeding substantives, *estates* as well as *estate*.

that the testator had real estate in his contemplation: *Goodright d. the Earl of Buckinghamshire v. The Marquess of *Downshire*, 2 Bos. & Pull. 600; *Mostyn v. Champneys*, 1 N. C. 341, 1 Scott, 293. The [*87 defendant must satisfy the court that there is something in the will to prove, *incontrovertibly*, that the testator meant something else; as in *Jesson v. Wright*, 2 Bligh. 1. In *Hogan v. Jackson*, Cowp. 299, S. C. in Dom. Proc. 3 Bro. P. C. 2d (Toml.) ed. 388, the testator, after commencing his will with the words "as to my worldly substance," devised certain lands to his mother, M., for life; and, after giving certain legacies, to be raised out of those lands, concluded as follows,—*"I give and bequeath unto my dearly beloved mother, M., all the remainder and residue of all the effects, both real and personal, which I shall die possessed of."* It was contended that the words "real effects" meant real chattels, and that the words "bequeath," "effects," and "possessed," were applicable rather to personal than real property: but the court held that the clause amounted to a disposition of the whole of the testator's real and personal estate. Lord MANSFIELD's judgment is a very valuable one, and fully sustains the present argument. That case was followed by *Jongsma v. Jongsma*, 1 Cox, Ch. Cas. 362, where Sir LLOYD KENYON decided in conformity with Lord HARDWICKE's opinion in *Tilley v. Simpson*. [V. WILLIAMS, J. The will in *Hogan v. Jackson* commenced with the words "as to all my worldly substance."] It did so; and those words, it must be conceded, were very much dwelt upon. But it has since been determined that introductory words are of no importance.

In *Doe d. Evans v. Evans*, 9 Ad. & E. 719, 1 P. & D. 472, a lessee by demise to him and his heirs for lives, devised as follows (after legacies of money and furniture)—*"I give, bequeath, and devise to my wife A. all my money, securities for money, goods, *chattels, and [*88 estate and effects,* of what nature or kind soever, and wheresoever the same may be at the time of my death;" and I appoint my said wife executrix. The heir-at-law was not mentioned in any part of the will. It was held, that, by the word "estate," the residue of the term passed to the widow; although it was contended, that, by a covenant in the lease, such a disposal of the term would cause a forfeiture,—on which point the court expressed no opinion. In giving the judgment of the court, Lord DENMAN said: "We think, adverting to the doctrine of Lord HARDWICKE, in *Tilley v. Simpson*, that of Lord (then Sir LLOYD) KENYON in *Jongsma v. Jongsma*, and the later cases in which the same principle has been acted upon as in those decisions, that the realty does pass by the word 'estate' in this will; the term used being capable of passing it, and the accompanying words being satisfied by reference to the personal property." The court of Exchequer, in giving the reasons for the conclusion they came to, say: "There is no doubt but that the word 'estate,' when used in a will, is sufficient to pass real as well as personal property. A devise of 'my estate' or 'estates,' or 'all my

estate' or 'estates,' *prima facie* carries all the devisor's property, real as well as personal: but this *prima facie* meaning may be cut down or explained by the context; and one ground which was relied upon for contending that the word is not meant to include real property, was that it is associated with other words indicating personal property only. This distinction in such cases has been made, that where the other words are sufficient of themselves to include all the personal estate, then the word 'estate' shall be deemed to refer to real estate, as it would otherwise have no operation. But, if the other words would not include all the personal estate, but only a part of it, then the word 'estate' has *89] been taken to refer to personalty only, and to have *been used for the purpose of completing the otherwise imperfect enumeration of a testator's personal property. This was the principle propounded by Lord HARDWICKE, in *Tilley v. Simpson*. Whether the doctrine thus laid down is altogether satisfactory, we need not now determine; for, if in the present case the word 'estate' does extend to real property, and so include the reversion in question, it must be because it is *nomen generalissimum*, comprehending everything real and personal over which the testator had a disposing power. It is difficult to imagine a case in which the word 'estate,' by reason of its comprehensive character, would pass real property, but would not include all the personalty. Now, it is plain, that, in this case, the testator did not consider that he had used the word 'estate' in any sense which would include all his personalty: for, in the clause which follows next after the one in question, he disposes of an important part of his personal property, namely, his ready money, the money coming to him from the sale of the Middleham estate, and all moneys due to him at his death; treating all these as something which he had not given by the previous clause. If, therefore, the word 'estate,' as here used, does not include all the personal estate, it is necessary to give it some more limited sense than that which would be its ordinary import; and this can only be done by applying the doctrine of *noscitur a sociis*, and holding that the word has reference exclusively to matters of the same nature as those with which it is associated, and so is merely in the nature of a tautologous repetition of the words 'chattels' and 'effects.' On this ground, we shall certify to the Master of the Rolls, that the trustees took no interest in the reversion in question." The Master of the Rolls has sent this case here, in consequence of this mistake into which the court of Exchequer had fallen as to the *90] *effect of Lord HARDWICKE's doctrine. The court of Exchequer further say: "It may be right to add, that there are two clauses in the will which appear to us strongly to confirm our view of the case. In the first place, the gift is to Robson and Sleigh, their executors and administrators, and not to their heirs; and, though no doubt a gift of real estate to trustees and their executors, would be sufficient to carry the fee, yet the omission of the word 'heirs' is certainly indicative of an

intention to confine the operation of the clause to personal property: more especially as, in the prior parts of the will, where he is devising his real estate at Middleham, the testator uses the appropriate language, and devises to the same trustees, 'their heirs and assigns.' The other observation which occurs to us,—as showing that the real estate was not contemplated,—is, the expression 'wheresoever the same shall be at the time of my death.' It is difficult to affix any rational meaning to these words, except on the assumption that the subject-matter of the gift was something the locality of which was or might be variable; and this can only be done by holding that the gift was confined to personal chattels, properly so called." The circumstance of the testator having used the words "executors and administrators," instead of "heirs," is hardly of sufficient gravity to need an argument; it clearly shows no intention to *exclude* the realty. And the other words relied on by the court of Exchequer would be applicable, if the expression used were "real estates."

This very point was decided,—as was before observed,—in the case of the Mayor, &c., of Hamilton *v.* Hodsdon, 11 Jurist, 193, in the privy council. There, the testator, by his will, gave to J., his heir-at-law, an estate for life in one part of estate P., an estate during viduity *to his wife F. A., in the other part of estate P., remainder to [*91 N. in tail, remainder to the testator's daughters, for life; and, after giving certain specific chattels to his wife, F. A., he proceeded as follows:—"I give all the remainder of my *estate*, that is now in my possession, or may hereafter be mine, excepting what I have particularly given away, unto my wife, F. A.: and it is my will, that, whatever my estate may consist of, after debts and legacies are paid, that it be kept together," &c. N. died without issue. The heir-at-law of J. sold estate P. to the appellants, subject, as to part, to the daughters' estate for life. In a suit between the appellants and F. A.'s co-heiresses, it was held that the remainder in fee in estate P. passed to her under the residuary clause,—there being nothing in the context of the will to confine the natural and legal meaning of the word "estate" to personalty merely. Lord BROUGHAM, in giving the judgment, there says: "The real meaning of the word 'estate' is not 'real estate,' but 'real' *plus* 'personal,' and so, *reddendo singula singulis*, these words, which are to be restricted words, because they only apply to personal estate as they include future acquisitions, which would not, in the case of lands, pass under such a gift.(a) As the words are not intended to be used as excluding personalty, those words which are added here will apply to the personal part of the estate; and it does not follow on that account, that, because there is personalty whereon they can operate, therefore the realty is to be excluded. Now, I might show by several cases which have been mentioned at the bar, that that is the law upon the subject. Perhaps the one which shows it most clearly is Barnes *v.*

(a) In a will made before 1833.

Patch, 8 Ves. 604, because there the Master of the Rolls, commenting on what is laid down in an early case *by Lord HOLT (Lady *92] *Bridgewater v. The Duke of Bolton*, 1 Salk. 236), says: "The word 'estate' is *genus generalissimum*, and includes all things real and personal. I admit that it has been so qualified by the context as to bear a narrower signification; as in *Doe d. Spearing v. Buckner*, 6 T. R. 610, where the words were held insufficient to carry real estate, not as being of themselves insufficient to pass land, but, upon the context of the will, personal estate only being in contemplation of the testator. In *Shaw v. Bull*, 12 Mod. 592, Lord Chief Justice TREVOR says: 'generally, the words *my estate, the residue of my estate, or the overplus of my estate*, may pass an inheritance, where the intent is apparent to pass it.' But that is no longer law. The law is not now, that the word 'estate' will not pass the realty, or realty together with personalty, unless there is an intent so to do: it is just the other way; it is, that it will pass the realty as well as the personalty, *unless there be matter apparent to show that the intent is that it shall not pass the realty*. The report is here very inconveniently loose; for, it goes on, as if the Master of the rolls was arguing, as follows:—"But such intent to carry an inheritance by such words must be very apparent, and necessary to be drawn from the words of the will and circumstances of the case; for, if the words be indifferent to real and personal estate, or may be applied to personal alone, there the heir-at-law is not to be disinherited by the implication of such words, or any implication at all, but what is a necessary one.' (Vide 4 M. & R. 71 (d).) When I read this first, seeing that it was not in inverted commas, I was astonished: for, really, considering this was in 1808, it looked much more as if it was in the time of the early cases, when the law was not so settled as it is now. I will not say *93] very different, but, at all events, not so *settled; but, when I came to the next sentence, I saw it was a mistake of Mr. Vesey's, in not putting inverted commas; for, there should be inverted commas, just as there is in the former part of it. This is Chief Justice TREVOR's argument, not Sir W. GRANT'S. Sir W. GRANT goes on as follows: 'But the doctrine of modern cases is, that, where there is nothing to qualify the word 'estate,' it will carry real as well as personal estate; and the contrary intention ought to appear, to induce the court to put upon that word a less extensive signification than it naturally bears.' So that he says you must prove the negative in such a case, not regarding, of course, anything de hors; but, the words themselves proving the intent, the proof must be thrown on the other side, and the intent to restrain must be established by the context—the rest of the instrument; otherwise, in a will, it would pass the realty." *Saumarez v. Saumarez*, 4 Mylne & Cr. 331, shows that the natural effect must be given to general words, unless there be a clear and manifest intent to the contrary on the face of the will.

From the time of Lord HARDWICKE, therefore, to the present time, we have a uniform series of decisions, that "estate" will, of itself, suffice to carry realty, unless there be, upon the face of the will, a clear indication of intention to the contrary. Here, it is true, the word "estate" is accompanied by words of personalty. These, however, are of themselves sufficiently satisfied by applying them to the rest of the testator's property.

Malins (with whom was *Fleming*), *contrâ*. The decision of the court of Exchequer, 1 Exch. 81, is based upon this sound and intelligible principle, that, in ascertaining the intention of the testator in the use of the ambiguous expression "estate," regard must be had to the whole of *the context. It is material also, with this view, to look at the [*94 situation of the testator. He had, at the time of making his will, real estate in possession, which he had contracted to sell; and he had the interest in question, which was a remote reversion in fee. It is imputing to him, therefore, a somewhat strange intention, to say that he meant, by the words in question, to pass a remote reversion, rather than an estate in possession. It is evident that he knew how to deal with real estate. [V. WILLIAMS, J. He gives an estate for life to heirs, executors, &c., and estates *per auter vie*, without impeachment of waste,—showing that he had no knowledge of law.] When dealing with realty, he always uses the word "heirs." It is to be presumed, therefore, that, if he had intended to dispose of this property, he would have used appropriate terms.

In all the cases cited on the part of the plaintiff, where the word "estate," though associated with words more appropriately descriptive of personalty, has yet been held to carry the realty, it has occurred in a *residuary* or a *universal* devise; where, therefore, it was necessary to give the word the widest construction of which it was susceptible, in order to carry the testator's intention into effect.

The clause now in question begins with forks and spoons: and then it goes on,—“And I give all the rest of my household furniture, books, linen, and china (except as hereinafter mentioned), goods, chattels, *estate* and effects, of what nature or kind soever, and *wheresoever the same shall be at the time of my decease*, unto the said John Robinson and Jonathan Sleigh, their *executors, administrators, and assigns*, in trust, as soon as conveniently may be, to sell and dispose of the same, and to apply the money by such sale arising, towards payment of my debts, and the legacy hereinafter mentioned, and to pay the surplus (if any) to my said *sisters Margery Stapyhton and Martha Stapyhton.” The testator is [*95 here evidently dealing with his household chattels only, and clearly did not contemplate or intend to deal with anything else. [MAULE, J. It is plain that that clause did not, in his apprehension, include his ready money and securities for money, for, these he disposes of by the next clause.] In truth, all the expressions after the words “household furni-

ture, books, linen, and china," are redundant and idle. The use of the words "executors, administrators," &c., are no further important than this,—that, where you find expressions that are *prima facie* applicable to personalty only, you require something more to show that realty was intended to be included. The words "whatsoever and wheresoever" fairly justify the comment made upon them by the Court of Exchequer, and also tend strongly to the same conclusion.

Jongsma v. Jongsma and Doe d. Evans v. Evans were both cases of universal devise. In Woollam v. Kenworthy, 9 Ves. 137, the word "estate" in a residuary clause was restricted to personal property, by the controlling effect of the context, although the will contained a specific devise of lands. So, in Bebb v. Penoyre, 11 East, 160, real estate was held not to be included in a devise of *the rest and residue*, on the ground of the restraining effect of the immediate context, although there was a previous devise of land in the same will. Lord ELLENBOROUGH there says: "Upon the meaning of the residuary clause, there can be no doubt. After giving several pecuniary bequests, the words are, 'I order the lease of my house, &c., to be sold, and *all the rest and residue* to be divided, &c.' Order whom? He must have meant his executors immediately afterwards named, by whom the lease of his house, &c., was to be sold. The words *rest and residue*, therefore, in the place in which *96] they stand in this will, and so accompanied, must mean property of a similar nature to the lease of the house and furniture before mentioned, that is, his personal estate." In Timewell v. Perkins, 2 Atk. 102, the testator devised in these words,—“All those my freehold lands, with the messuages, &c., now in the occupation of L., and all other the rest and residue and remainder of my *estate*, consisting in ready money, plate, jewels, leases, judgments, mortgages, or in any other thing *whatsoever or wheresoever*, I give unto A. H. and her assigns for ever.” In the preamble of the will occurred the clause, “as touching the *personal* estate with which it hath pleased God to bless me, I dispose thereof as follows.” The question was, whether land, not described in the will, passed under the residuary clause. FORTESCUE, J., held that it did not—relying on the analogy of the case to Wilkinson v. Merryland, Cro. Car. 447, 449; Sir W. Jones, 380. Et vide S. C., per nom. Wilkinson v. Merdam, 1 Roll. Abr. 415 (translated, 5 Vin. Abr. 73, pl. 11). Mr. Jarman, in his Treatise on Wills, vol. 1, p. 662, thus remarks upon that decision: “In the case just stated, there was a preceding specific devise of land; but the intention to confine the word ‘estate’ to personalty, was inferred from the subsequent explanatory words of description; which, however, were themselves followed by expressions scarcely less strong than many which have been held sufficient to include real estate. Perhaps the introductory clause, referring to *personal* estate only, may be considered a circumstance of distinction; but that is rendered almost nugatory by the subsequent specific devise, which carried the

dispositions of the will beyond personal estate. The case of *Timewell v. Perkins* is unquestionably a strong case, and has generally been much relied upon as an authority for the restricted construction on subsequent *occasions." *Doe d. Bunny v. Rout*, 7 Taunt. 79, 2 Marsh. 397, [*97 is also a strong authority: the words of the will were,—“I devise my just debts of every sort, with my funeral expenses, to be paid and properly discharged by my executrix hereinafter named; and, subject thereto, I give and bequeath unto my sister A. R. all my stock in trade, household goods, wearing apparel, ready money, securities for money, *and every other thing, my property, of what nature or kind soever*;" and the testator appointed A. R. executrix. This court held that an intention to pass land could not be clearly collected from these words. So, in *Roe d. Helling v. Yeud*, 2 N. R. 214, where the testator, after giving certain legacies, and appointing certain persons executors, added, “and to whom I give *all the remainder of my property, whatsoever and wheresoever*, to be equally divided amongst them, share and share alike, after their paying and discharging the before-mentioned annuities, legacies, debts, and demands, or any I may hereafter make by codicil to this my will, all my goods, stock, bills, bonds, book-debts, and securities in the Witham Drainage, in Lincolnshire, and funded property.” The court held that real estate did not pass; considering that the enumeration at the end of the clause was explanatory of the words “remainder of my property.” In *Doe d. Hurrell v. Hurrell*, 5 B. & Ald. 18, a testator having both real and personal estate, after giving several pecuniary legacies, bequeathed all the rest and residue of his estate and effects, *whatsoever and wheresoever*, to trustees, their *executors, administrators*, and *assigns*, upon trust, that they should, out of such residue of the moneys and effects that he should die possessed of, carry on, manage, and cultivate the farm then in his possession, for the remainder of his term therein, *for the joint advantage of certain of his sons and daughters [*98 therein named; and, at the expiration of the said term, upon further trust to sell and dispose of such residue of his estate and effects, *or such effects as should then be upon his said farm*, and to divide the money arising therefrom among his said sons and daughters: it was held that the testator’s real estate did not pass. ABBOTT, C. J., said: “There can be no doubt that words which, in their technical sense, generally denote personal property, will pass the real estate, if such appears from the whole of the will, taken together, to have been the intention of the testator. It is quite clear that the testator here intended that his personal property only should go to the trustees. The bequest is to them, their executors, administrators, and assigns; the word ‘heirs’ is not used. That circumstance is not, indeed, very strongly to be relied on; but *it is not to be altogether rejected*, in construing this will. The nature of the trusts clearly shows that the testator meant to bequeath his personal property only; for, the trustees are directed, out of such

residue of the moneys and effects, to manage the farm for the remainder of his term. Now, the real estate was not applicable to such a purpose; for, the trustees, at all events, had no power to sell any part of the estate bequeathed to them, until the end of the term. Then, the testator directs the trustees, at the expiration of his term, to sell such residue of his estate and effects, *or such effects as shall be upon his said farm*. It appears to us, therefore, that by using the latter word, he himself has furnished a comment upon the words *the residue of his estate and effects*; and that, by those words he meant only such estate and effects as constituted personal property." And in *Doe d. Spearing v. Buckland*, 6 T. R. 610, the testator prefaced his will with these *99] words,—“As to my estate and effects, both real and personal, I dispose thereof in manner following:” then, after giving some pecuniary legacies, and an annuity, which he charged on a freehold messuage in W., he concluded as follows: “All the rest, residue, and remainder of my *estate* and effects of any and what nature or kind soever and wheresoever, I give and bequeath the same unto C. B. and J. R., *their executors or administrators*, in trust that they shall from time to time *add the interest thereof to the principal*, so as to accumulate the same, as it is my will that the said residue shall not be *paid or payable*, but at the time, and in the manner, and to the several persons, as the said principal sum of 4000*l.* (which was a legacy before given) is before directed to be paid:” it was held, notwithstanding the introductory words, that the real estate of the testator did not pass under this clause. And Lord KENYON observed that the limitation to executors and administrators, and particularly the direction to add the interest *thereof* to the principal, were wholly inapplicable to a real estate. In *Doe d. Haw v. Earles*, 15 M. & W. 450, the testator devised as follows: “I dispose of *all my effects* as follows,—All my household goods, live stock, furniture, plate, wearing apparel, *and other effects* at this time in my possession, or that may hereafter become my *property*, unto my wife J. H. I bequeath to J. P. 200*l.* to be paid to her at the death of my wife. But, if my wife, after my decease, see fit to marry, her second husband shall have no claim whatsoever, that is, to sell or dispose of any part of the property now or hereafter may be in my possession; but the above sum of 200*l.* shall be paid to J. P. at the time of my wife’s marriage: It was held,—by POLLOCK, C. B., and PARKE, B. (PLATT, B., *dissentiente*), that a remainder in fee in real estate, did not pass by this *100] devise. The case of *Saumarez v. Saumarez* is in perfect conformity with this rule.

With respect to the case cited from the Jurist, of *The Mayor of Hamilton v. Hodsdon*, there is clearly nothing in it that would or ought to have induced the Court of Exchequer to come to any other conclusion than that which they did come to. The words of the residuary clause

in that will were large enough to comprehend property of every description.

Hodgson was heard in reply.

The following certificate was afterwards sent to the Master of the Rolls :—(a)

"This case has been argued before us by counsel. We have considered it, and are of opinion, that, under the above-stated will of Thomas Stapylton, the reversion in fee-simple in the hereditaments at Leyburn, Bellerby, and Harnby, passed to John Robson and Jonathan Sleigh, the devisees in trust therein named. (b).

"THO. WILDE.

"W. H. MAULE.

"C. CRESSWELL.

"E. V. WILLIAMS."

(a) For American cases, see *Jackson ex dem. Dicker v. Merrill*, 6 Johnson's Reports, 185, and cases cited (3d edit.) in the reporter's note; *Jackson ex dem. Pearson v. Housel*, 17 Johnson, 181; *Morrison v. Semple*, 6 Binney, 94.

(b) Lord LANGDALE, M. R., not being satisfied with this certificate,—the grounds upon which the conclusion had been come to by this court not appearing,—directed a third case to be sent for the opinion of the court of Queen's Bench.

*GRIFFIN v. GILBERT. Jan. 20.

[*101

Service of a rule to compute, by delivering it to "the landlord at the residence of the defendant," is not sufficient.

REW moved to make absolute a rule to compute, upon an affidavit which stated, that, since the defendant had been served with the writ and notice of declaration, he had removed from his former residence at, &c., to the railway-station at Kingston, where he had taken lodgings in the house of one Holditch; that the deponent, on, &c., served the defendant with a true copy of the rule, by leaving the same with the said Holditch, at the residence of the said defendant at the railway-station at Kingston aforesaid, and at the same time produced and showed to Holditch, the original rule; and that Holditch stated that the defendant would return home on the following day, when he would deliver the said rule to him. He referred to *Taylor v. Whitworth*, 9 M. & W. 478, 1 Dowl. N. S. 600, where an affidavit of service of a rule to compute, stating that the deponent served "the above-named defendant with a true copy of the rule, by delivering and leaving with one Hitchcock, at the defendant's residence, situate, &c., a true copy of the said rule, and at the same time showing the original thereof, and that Hitchcock promised to deliver the said copy to the defendant,"—was held to be *insufficient, as it did not show a service on any person connected with the defendant's residence*; and to *Lawes v. Scales*, 2 Dowl. N. S. 342, where service of a rule to compute, on the daughter of the defendant's landlady, at the house, in which the

defendant was personally served with notice of declaration, was held to be *sufficient*.

*102] *WILDE, C. J. In *Gardner v. Green*, 3 Dowl. P. C. 343, and *Salisbury v. Sweetheart*, 5 Dowl. P. C. 243, service of a rule to compute, "on the *landlady* of the house at which the defendant lodges," was held to be insufficient. LITTLE, J., in the last-mentioned case, says—"Although she is the *landlady* of the house, it by no means follows that she is an agent for the purpose of receiving papers for her lodgers." I think service on the landlord, without more, will not do.

The rest of the court concurring,

Rule refused.

LEWIS v. BLURTON. Jan. 31.

Service of a rule to compute, by delivering it to "the housekeeper at the residence of the defendant," situate, &c., is not sufficient.

CHANNELL, Serjt., moved to make absolute a rule to compute, upon an affidavit of service of the rule nisi "by delivering to and leaving the same with the housekeeper at the *residence* of the defendant, situate No. 54, St. James's Street," and at the same time showing her the original. He submitted, that, although service upon a mere laundress at a place where the defendant occupies *chambers* will not be good service,^(a) yet that it was different where the place of service was the defendant's *residence*.

MAULE, J. Service on a "housekeeper" at a place where several persons are residing, clearly will not do, without showing that she had authority to receive papers for the defendant.

Rule refused.

(a) See *Dodd v. Drummond*, 1 Dowl. P. C. 381.

*103] *WOOLF v. THE CITY STEAM-BOAT COMPANY. Jan. 29.

A company may be declared against by the name by which it is known, without alleging it to be chartered or incorporated or registered.

ASSUMPSIT. The declaration commenced thus:—"The plaintiff complains of The City Steam-Boat Company, who have been summoned to answer the plaintiff," &c.

Special demurrer,—assigning for causes, that the names of the defendants were not stated, that it did not appear whether they were sued as a corporation or a company completely registered, or by virtue of what act of Parliament they were entitled to be sued by the name of a company.

Hugh Hill, in support of the demurrer. The question in this case whether the plaintiff may, in his declaration, describe the defendants company, without showing whether or not they are a corporation, or

a registered company. In the doubtful state of the allegation, the defendants could not safely plead *nul tiel* corporation. [CRESSWELL, J. Is not this the usual form of declaring against a corporation? It may be that the defendants are a chartered company: how does it appear that they are not?] In *Thompson v. The Universal Salvage Company*, 1 Exch. 694,—which was an action against a registered company, upon a promissory note,—the declaration stated that the company had been duly registered under the statute 7 & 8 Vict. c. 110. [MAULE, J. If the defendants in fact are a corporation, the declaration is correct: if they are not, they may traverse it.] In *The Queen v. West*, 1 Q. B. 826, a coroner's **inquisition* stating that certain goods and chattels were the goods and chattels of the proprietors of the Hull and Selby Railway, was held bad, because it did not show that there was any corporation so intituled. [CRESSWELL, J. That case would have been more to the purpose, if the defendants here had been described as "the proprietors of the City Steam-Boats."'] Since the statutes creating these registered corporations, it is essential that they should in all proceedings be described according to the truth. [CRESSWELL, J. How can the mode of describing them in pleading, be affected by the statutes?] It is important that the true character in which a party sues or is sued should appear upon the record.

Hawkins, contra, was not called upon.

MAULE, J. The mode of pleading is governed either by positive rules or by a known course of precedents. There is no positive rule that I am aware of, which requires such a mode of description as the defendants' counsel insists upon in this case: nor is the description which is given at all out of the usual form: it impliedly amounts to an allegation that the defendants are a corporate body. I think the plaintiff is entitled to judgment.

The rest of the court concurring,

Judgment for the plaintiff.

***MILLER and Another v. SHUTTLEWORTH. Jan. 31. [*105**

Where a cause is referred, the arbitrator to be at liberty to state any point of law for the opinion of the court, and he declines to do so, the court will not interfere with his discretion.

THIS was an action brought by the plaintiffs, who were attorneys, to recover against the defendant, a member of the committee of management of a railway company, the amount of a bill of costs for business done for the company. The cause came on for trial at the last assizes at Guildford, when a verdict was found for the plaintiffs, by consent, for 2000*l.*, subject to a reference to a barrister, who was to be *at liberty* to raise any question of law for the opinion of the court. The only evidence of retainer before the arbitrator, was, a resolution of the managing committee to which the defendant was not a party: and it was thereupon

objected that the defendant was not liable, and the arbitrator was requested to raise the point upon his award; which he omitted to do, and made an award in the plaintiffs' favour for a considerable sum.

Pearson now moved to set aside the award, or to refer it back to the arbitrator to state the point. [MAULE, J. Was the arbitrator *bound* to raise the question?] There are many things which a party is bound to do, though the language of the instrument is permissive only: for instance, in acts of parliament, and in marriage settlements, "may" is often construed to mean "shall." So, the court will control the discretion of an arbitrator where the point sought to be raised, and which he had power to raise, was a grave point of law.

WILDE, C. J. These orders are well understood. There is a material *106] difference between a reservation of *power to the arbitrator to state points of law for the opinion of the court, and a direction that he *shall* do so. The parties are clearly bound by the decision of the arbitrator: and we have no power to interfere.

MAULE, J. It was in the discretion of the arbitrator to raise the point or not, as he might see fit.

The rest of the court concurring,

Rule refused.

DODD v. WIGLEY. Jan. 29.

To entitle a defendant to enter a suggestion to deprive the plaintiff of costs, under the county courts act, 9 & 10 Vict. c. 95, the affidavit must in positive terms state that the defendant was resident within the local jurisdiction, and must negative the parties' respectively being officers of the county court, at the time of the commencement of the action.

Quære, whether a case is brought within the second exception of the 128th section, where part of the cause of action arose (i. e. where some of the goods were delivered, or a portion of the work done) within the jurisdiction of the court "within which the defendant dwells or carries on his business at the time of the action brought?" (a)

JOYCE, on the fourth day of this term, obtained a rule nisi to enter a suggestion to deprive the plaintiff of costs, under the 9 & 10 Vict. c. 95, s. 129, upon an affidavit (b) which stated,—that this was a personal action for the recovery of a debt not exceeding 20*l.*, that is to say the sum of 3*l.* 4*s.* 3*d.*, in which no 'title to any corporeal or incorporeal *107] hereditament, or toll, *fair, market, or franchise ever was or is in question, or the validity of any devise, bequest, or limitation under any will or settlement disputed, but that the action was an action of debt for medical attendance, and for medicine and goods sold and delivered; that the cause was tried, on the 1st of December last, at the Secondaries' Office, in Basinghall Street, in the city of London, when the

(a) But see *Wood v. Perry*, post, p. 114, n. (a).

(b) See *Walker v. Furnell*, 14 Jurist, 45, where it was held, by the court of Exchequer, that an affidavit for a rule to deprive a plaintiff of costs under the 9 & 10 Vict. c. 95, s. 129, may be made by a stranger, who is not shown to be connected with, or have any peculiar means of knowledge of either the facts of the suit, or of the parties to it.

plaintiff only gave evidence of medicines delivered to the defendant, and a verdict was found for the plaintiff for the sum of 2l. 10s., and no more, being the amount of medicines proved to have been delivered to the defendant; that the cause of action herein did arise, in some material point, within the jurisdiction of the Westminster county-court of Middlesex, in which (?) the defendant dwells and carries on his business, *for*, the deponent said that all the medicines, with the exception of about three small items, not exceeding 10s., were delivered to the defendant at the Union Club House, which is within the jurisdiction of the said Westminster county-court of Middlesex, and is the place where, before and at the time of the commencement of this suit, the defendant *was* and *is* employed, *dwells*, and *carries on his business*; that the plaintiff does not nor did he at the time of the commencement of this suit, dwell more than twenty miles from the defendant, *for*, the deponent said that the plaintiff is, and then was, a surgeon, dwelling at, and carrying on his business at, the Westminster Road, Lambeth, in the county of Surrey, and the defendant is a clerk to the Union Club, and *resides and dwells* at the Union Club aforesaid, which is within the jurisdiction of the said Westminster county-court of Middlesex, and the places of residence last aforesaid are less than two miles from each other; that the plaintiff had, at the time when the debt for which this action is brought was contracted, a residence or place of business within the jurisdiction of the said Westminster *county-court of Middlesex, that is to say, in Clifford Street, Bond Street, in the county of Middlesex; that some of the goods were proved to have been sent from Clifford Street; that neither the plaintiff nor the defendant *is* an officer of the said Westminster county-court of Middlesex, nor was any officer of the said county-court a party directly or indirectly concerned in the matters in question in this cause; that neither the plaintiff nor the defendant, as the deponent believed, is exempt from or out of the jurisdiction of the said Westminster county-court of Middlesex, but the defendant ought to have been summoned in the said cause by the plaintiff in the said Westminster county-court of Middlesex, the cause being a cause for which a plaint ought to have been entered in the said county-court; that judgment was signed herein on the 9th of January instant, but the plaintiff had not yet taxed his costs; and that the said Westminster county-court of Middlesex was, at the time of the commencement of this suit, and now is, a county-court for the recovery of debts and demands under and according to the provisions of an act made and passed, &c., intituled, &c., and had been before, and was at the time of the commencement of this action, and now is, established, constituted, and holden in and for the district of Westminster, in the county of Middlesex.

G. T. White now showed cause, upon an affidavit of the plaintiff, stating that his demand for which the verdict passed, commenced against the defendant in November, 1846, at which time, and from thence

hitherto, the deponent resided and carried on his said profession and business of a surgeon and apothecary, &c., and still did so at No. 91, Westminster Bridge Road, in the county of Surrey, which is a place *109] not within the district or jurisdiction of the Westminster county-court of Middlesex; and that certain specified items of the plaintiff's demand, together amounting to 12s. 6d., and which were included in the sum for which the verdict was given, were for medicines delivered to the defendant at No. 91, Westminster Bridge Road.

The general jurisdiction given to the county-court by the 58th section of the 9 & 10 Vict. c. 95, is limited and controlled by the exceptions contained in s. 128, which enacts that "all actions and proceedings which before the passing of this act might have been brought in any of Her Majesty's superior courts of record,—where the defendant dwells more than twenty miles from the defendant,—or, where the cause of action did not arise *wholly or in some material point* within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought,—or where any officer of the county-court shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof,—may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if this action had not been passed." The affidavit upon which this motion is founded, does not properly negative either the second or the third exception in that section, and therefore the defendant has failed to show affirmatively, as he was bound to do, that the plaintiff's right to sue in the superior court is taken away: *Matthew v. Broughall*, 5 Man., Gr. & S. 937; *Meeten v. Nicholls*, 5 Man., Gr. & S. 848. As to the second exception, the affidavit states, that the cause of action arose, in some material point, within the jurisdiction of the Westminster court, in which the defendant *dwells* and carries on his business, *for*, that the *110] goods (with a small exception) *were delivered to the defendant at the Union Club House, which is within the jurisdiction, and is the place where, before and at the time of the commencement of this suit, the defendant *was and is employed, dwells, and carries on his business*. In no part of the affidavit is there any statement as to where the defendant *dwelt at the time the action was brought*. [MAULE, J. Might not perjury be assigned upon this affidavit, if it were untrue that the deponent *was employed* at the Union Club House at the time of the contract, and *dwelt* there at the time of the commencement of the action?] It is submitted that it could not.

The third exception in the 128th section is—"where any officer of the *nty-court* shall be a party." As to this, all that the affidavit states, is that "neither the plaintiff nor the defendant *is* an officer of the said Westminster county-court of Middlesex, nor *was* any officer of the said *nty-court* a party directly or indirectly concerned in the matters in

question in this cause." That refers to the time of swearing the affidavit, whereas the statute speaks as of the time of action brought. Besides, the exception applies to officers of *any* county-court; for, by the interpretation clause, s. 142, "county-court" is to be understood to mean "any court holden under this act." [WILDE, C. J. I do not think you will make much of *that* point.]

The true interpretation of the second exception in the 128th section, is, that the jurisdiction of the superior courts is not taken away, unless the cause of action arises *wholly* or in *some material point*,—that is, some material point which pervades the whole cause of action,—within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought. And this the affidavit does not show. ALDERSON, B., suggested the point in *Butler v. Corney*, 2 Exch. 474, 17 Law Journ., N. S. Exch. 265, but it was not decided. In the course of the argument, the learned baron [*111 asked—"Is not the meaning of the 128th section, that the superior court shall not have jurisdiction, where any material *part* of the cause of action arises within the jurisdiction of the county-court?" And, subsequently, he adds—"The section is awkwardly worded: I am not certain that it does not mean, 'if no material *part* of the cause of action arises out of the jurisdiction,' instead of meaning as I at first thought, 'if any material *part* arises within it.'" [V. WILLIAMS, J. The expression in the statute is, "material *point*."] The plaintiff's affidavit shows that a material part of the cause of action arose in Surrey. [MAULE, J. Suppose the plaintiff had sued in the superior court for the goods delivered in Surrey only?] In that case, the objection could not have arisen. [MAULE, J. Then is he to forfeit his right to sue in the superior court, because he has added a cause of action arising in Middlesex?] It is submitted he does not. [V. WILLIAMS, J. The plaintiff has his option, unless the *whole* demand arises within the county in which the defendant dwells. There is here no material point pervading the whole cause of action, that arose within the jurisdiction of the Westminster county-court.]

Joyce, in support of his rule. *Butler v. Corney* and *Hayter v. Fish*, 6 Man., Gr. & S., 568, are authorities to show that the courts will not examine the affidavits in these cases with the same astuteness they would apply to pleadings on special demurrer. The affidavit here, it is submitted, is reasonably sufficient to satisfy all the requisitions of the statute. In *Hayter v. Fish*, the affidavit was held to be sufficient, although it did not show within which of the eleven districts, into which the county of Middlesex is divided, the defendant dwelt. There is undoubtedly [*112 a little grammatical inaccuracy in the frame of this affidavit: but it distinctly enough appears that the defendant's dwelling-place, as well at the time the goods, &c., were supplied, as at the time of action brought,

was, the Union Club House. The negation of the parties' respectively being officers of the court, also, is sufficiently pointed and precise.

The words "cause of action" have already received a judicial interpretation in the case of *Grimbly v. Aykroyd*, 1 Exch. 479, 17 Law Journ. N. S. Exch. 157, where they were held to mean "cause of *one* action." So, here, the cause of action is, the plaintiff's *whole* demand. The question is, whether the cause of action, in some material point, arose out of the local jurisdiction. The words "material point" are evidently used by the legislature in the same sense as the courts use "material evidence" in the case of rules to restore the venue. "Some material point" means "some material portion" of the plaintiff's whole claim. This is the only sensible construction that can be put upon the words of the 128th section. [V. WILLIAMS, J. If your argument be correct, it would have been easier for the legislature to have said, "where the cause of action shall not have arisen wholly or partially within the jurisdiction of the county-court," &c.] Experience will hardly justify the court in assuming that the legislature is accustomed to adopt the readiest mode of expressing its meaning. The construction contended for on the other side will tend very materially to impair the usefulness of this act of parliament. The precise point is now *sub judice* in the court of Exchequer.(a)

WILDE, C. J. I think the affidavit upon which this rule was obtained, *113] is not sufficiently precise. We are bound to see that the party distinctly pledges himself to the truth of the facts which he states. The affidavit in this case fails in the two particulars that have been pointed out. In the first place, it does not show that the defendant was resident within the jurisdiction of the Westminster county-court of Middlesex at the time of the commencement of the action. In the next place, it merely negatives the parties being officers of the county-court at the time of making the affidavit. The material time, in respect of both, is, the time of the commencement of the action. It becomes, therefore, unnecessary to determine the other point, which is one that might have required further consideration. The rule must be discharged.

CRESSWELL, J.(b) The question upon the merits is certainly one of difficulty. But I agree with the lord chief justice in thinking that the affidavit is insufficient. It is said that the meaning of the affidavit is obvious, though grammatically incorrect. If it be grammatically incorrect, and insensible unless construed in the way contended for on the part of the plaintiff, it must receive that construction. But I do not see why we should impute bad grammar to the defendant. If the defendant meant to say, that, at the time of the commencement of the suit, he was employed at the Union Club House, and that he is still employed there, and dwells and carries on his business there, he has used language apt

(a) In *Wood v. Perry*, vide post, p. 114, n. (a)

(b) MAULE, J., had gone to chambers.

enough to convey his meaning. In the case cited, of *Hayter v. Fish*, the affidavit did state the place of residence of the parties at the time of the commencement of the action: the defect that was principally relied on, was, that it did not state within the jurisdiction of which of the eleven districts into which the county of Middlesex is divided, the cause of action arose, or the parties respectively carried on business.

*V. WILLIAMS, J. If any affidavit at all is required in these cases, the ordinary rules that are applicable to the construction [*114 of affidavits must be applied to them. It is to be regretted that the principal point should be left undecided.(a)

Rule discharged, with costs.

(a) The court of Exchequer has since decided, in a manner which is not in accordance with the evident impression of the majority of the court in the principal case: *Wood v. Perry*, 6 D. & L. 194. ALDERSON, B., delivering the judgment of the court there, says:—

“The plaintiff dwells within twenty miles of the defendant; and the question is, whether the cause of action arose ‘wholly or in some material point’ within the jurisdiction of the county-court of Brompton, where the defendant resided, or of Westminster, where he carried on his business when this action was brought. It seems clear, that, if each of the items is to be treated as constituting a separate cause of action, one whole cause of action arose out of either jurisdiction, and then it would seem to follow that the superior court was the only court in which the whole demand could be recovered in one action. But we think this must be determined in conformity with the rule laid down by this court in *Ackroyd*, in re, 1 Exch. 479. We there laid it down, that, where a tradesman has a bill against a party for any amount, in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continued, so that one item, if not paid, shall be united with another, and form one continuous demand, the whole together forms but one cause of action, and cannot be divided. In other words, we held that the words ‘cause of action,’ in this act of parliament meant ‘cause of one action,’ and were not to be limited to an action upon one separate contract. Now, here, the items in this bill are thus connected together, and the whole bill forms one cause of action. Then, if so, it follows that it is a cause of action not ‘wholly’ occurring within the jurisdiction of the county-court either of Brompton or of Westminster; for, a part of it occurs within the jurisdiction of Clerkenwell, where the defendant neither resides nor carries on his business. But, does it arise in some ‘material point’ within the first two jurisdictions, or either of them? We think it does; and we are disposed to determine the question by laying down some definite rule which may be easily acted upon; and to hold, that, *if any one item arises within the jurisdiction of a county-court, in such a bill as this, the cause of action in some material point arises within that jurisdiction.*”

Where goods are ordered of a tradesman on the 1st of January, and distinct orders for other goods are given on the 2d, 3d, 4th, 5th, &c., *if from the previous dealings between the parties, or from general usage, or otherwise, it is to be inferred that it was contemplated [*115 by the parties, that, in the event of the dealing continuing, the several items should be included in weekly, monthly, quarterly, or yearly bills, the result of such an arrangement, and the legal position of the parties, seems to be this,—upon the delivery and acceptance of the first parcel of goods, delivered on the 1st of January, an entire contract is created, and a complete cause of action accrues, the tradesman being under no engagement to sell other goods, or to give credit beyond the price of the articles then delivered: when, on a subsequent day, other goods are delivered and accepted, a new contract arises, not simply a contract to pay for the goods then delivered, but a new entire contract by which the tradesman waives his existing right to payment for the goods delivered on the 1st of January, and the purchaser agrees to pay for both parcels as upon one entire sale, *et sic toties quoties*. After the successive waiver and extinguishment of each preceding contract, the only subsisting contract and cause of action *ex contractu* will be the last. The distinction between a cause of action upon one entire contract, and one cause of action of contract, appears to be too refined to be readily appreciable. In *Ackroyd*, in re, there appeared to be one entire *prevenient* governing contract, of which the respective deliveries were merely the execution—the *overt acts*.

After the rule had been so frequently laid down in text-books and acts of parliament, that entire causes of action should not be split, for the purpose of bringing them within the compe-

tency of courts of limited jurisdiction, it may have been unnecessary to repeat the prohibition in the small debts act. The old rule was evidently directed against the splitting of one entire contract; as appears from the particular cases of abuse which are put: and there is nothing to show that the legislature was not, on the present occasion, proceeding, however unnecessarily, in the same track. It has lately, indeed, been decided (*Vines v. Arnold*, post, M. T. 1849) that a plaintiff, having recovered in the county-court for part of one entire demand, is not precluded from afterwards suing in the superior court for the residue of that demand, where he has not signified his election to forego the residue of his demand, under s. 63.

In indebitatus assumpsit, the action is not founded *directly* upon the several debts included in, or rather covered by, the count, but upon the one entire contract founded on the promise, of which the several contracts form the consideration. The modern indebitatus count in debt is an artificial perversion of the indebitatus count in assumpsit.

And see *F. N. B. 46*; *Sinclair v. Bowles*, 9 B. & C. 92, 4 M. & R. 1; *The King v. The Sheriff of Herefordshire*, 1 B. & Ad. 672; *Roberts v. Havelock*, 3 B. & Ad. 404; *Neale v. Ellis*, 1 D. & L. 163; *Wickham v. Lee*, 12 Jurist, 628.

*116]

*SHELLS v. RAIT. Jan. 30.

One who resides in Scotland, and carries on business in London by means of an agent, is not bound to sue in the city small debts court established under the 10 & 11 Vict. c. lxxi., for a debt not exceeding 20*l.*

SIMON, on a former day, obtained a rule nisi to enter a suggestion, under the 10 & 11 Vict. c. lxxi., to deprive the plaintiff of costs, the sum recovered being under 20*l.*, and the subject-matter being within the jurisdiction of the city of London small debts court. The affidavit upon which the motion was founded, stated, that the action was brought to recover 4*l.* for goods sold and delivered; that, at the trial before the sheriffs of London, the plaintiff recovered a verdict for 3*l.* 16*s.* and no more; that, before and at the time of the commencement of the action, the defendant carried on his business, and still resides and carries on his business, at No 25 Moorgate Street, in the city of London within the jurisdiction of the court for the recovery of small debts, established in and for the city of London, under the 10 & 11 Vict. c. lxxi., and that a plaint might have been entered in the said court for the recovery of the sum so claimed by the plaintiff; that the plaintiff *carries on his business* as a spirit merchant at the Three Cranes Wharf, Upper Thames Street, in the said city of London, within the jurisdiction of the said court, *and within twenty miles* of the defendant's said residence and place of business; and that the goods were delivered at the residence and place of business of the defendant, from the said wharf. The affidavit then proceeded to negative the judge having certified under the *117] 113th section,(a) and *also to negative the second exception in the 112th section.(b)

Phinn now showed cause, upon an affidavit which stated "that the plaintiff does not now, and did not at the time of the commencement of this action, or at the time when the cause of action arose, or at any time since such cause of action arose, dwell or reside, or personally carry

(a) Which corresponds with the 129th section of the 9 & 10 Vict. c. 95.

(b) This section corresponds with s. 128 of the 9 & 10 Vict. c. 95, ante, p. 109, save in the particular pointed out, 6 Man. Gr. & S. 244 (c). See the section, post, p. 118 (c).

on his business at Three Cranes Wharf, or at any other place in the city of London, or at any place not more than twenty miles distant from the said city, but that the plaintiff, before and at the time when the said cause of action arose, dwelt or resided and carried on his business, and from thence hitherto continually hath dwelt or resided and carried on his business, in the borough of Leith, in Scotland, which said borough is much more than twenty miles distant from the city of London; that, since the year 1845, the plaintiff employed the deponent as his agent for the sale of goods, and for that purpose had a vault or store-cellar at Three Cranes Wharf, but that he never slept or resided at the said vault or store-cellar, and that he had not, at the time of the order for, and the sale and delivery to the defendant of, the goods in respect of which this action was brought, or at any time since, any residence or dwelling in the city of London, or within twenty miles thereof; that, to the best of the deponent's belief and knowledge, the plaintiff had not been in London, or within twenty miles thereof, for the last three years; and that the goods were ordered by and delivered to the defendant in the year 1847."

The affidavit upon which the rule was obtained does not negative the plaintiff's right to sue in the superior *court: it does not show [*118 that the plaintiff, at the time of the commencement of the action, *dwelt* within twenty miles of the defendant's place of abode: *Peterson v. Davis*, 6 Man. Gr. & S. 235. To hold that a plaintiff who resides in Scotland, and transacts business in London by an agent, is bound to have recourse to the local courts to enforce debts contracted within the jurisdiction, would, in truth, amount to a confiscation, seeing that the judge of the local court usually requires the party himself to appear and give evidence in support of his claim.

Simon, in support of his rule. To hold a person carrying on business as this plaintiff does, not to be compelled to sue in the inferior court, will, in effect, be abrogating the statute, so far as regards all persons who are represented by agents here. It is submitted that the plaintiff substantially resides in London. [WILDE, C. J. *Substantially*, I should say, he dwells in Scotland. CRESSWELL, J. How can a man be said to "dwell" in London by an agent?] It is submitted that he may, within the meaning of this act. [CRESSWELL, J. How would you construe the word "dwells" in the 40th section?(a)] Very much in the same way as in the 112th.(b) [CRESSWELL, J. That would be *giv- [*119

(a) Which enacts, "that such summons may issue, provided the defendant, or one of the defendants, shall *dwelt* or carry on his business within the city of London, or the liberties thereof, at the time of the action brought; or provided the defendant, or one of the defendants shall have dwelt or carried on his business therein at some time within six calendar months next before the time of the action brought; or if the cause of action arose therein."

(b) Which enacts, "that all actions and proceedings which before the passing of this act might have been brought in any of Her Majesty's superior courts of record,—where the plaintiff *dwells* more than twenty miles from the defendant,—or where any officer of the court holden under the provisions of this act shall be a party, except in respect of any claim to any goods and chattels

ing to the city-court a much larger jurisdiction than the county-court possesses. It would enable a man residing at St. Petersburg to sue and be sued in the city of London for demands under 20*l*.]

Per curiam,

Rule discharged.(a)

taken in execution of the process of the court, or the proceeds or value thereof,—may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if this act had not been passed.”

(a) It seems the proper form of motion in these cases is, “to set aside the judgment, if signed, on payment of costs, and then to enter the suggestion:” *Per* PARKE, B., *Soames v. Cooper*, 3 Exch. 38.

In re Baroness DUNSANY.

The court refused to direct the proper officer under the 3 & 4 W. 4, c. 74, to receive and file an acknowledgment, where the affidavit of verification was sworn before the British minister at Florence:—it not appearing that there was any difficulty in getting it sworn before some properly constituted authority at that place.

TALFOURD, Serjt., moved that the proper officer might be directed to receive and file a certificate of acknowledgment of the execution of a deed under the 3 & 4 W. 4, c. 74, s. 79, by the Baroness Dunsany. The deed was executed under the direction of the court of Chancery, and the acknowledgment taken before commissioners at Florence. The affidavit was sworn before the British minister at that place, and there was no notarial certificate. He referred to *Pickersgill in re*, 6 M. & G. 250, 6 Scott, N. R. 831, where the court allowed an acknowledgment to be received, where the affidavit verifying the certificate was sworn before the minister of the British Chapel at Moscow. [WILDE, C. J. There was an affidavit there, that there was no proper person at Moscow *120] before whom *the affidavit could be sworn, there being no English notary or British consul within several hundred miles; and it appeared that no magistrate in Russia has power to administer an oath. CRESSWELL, J. Is there no ordinary authority at Florence to take affidavits? Has the British minister any such authority?] There is no affidavit that he has; but it undoubtedly is customary for him to administer oaths; and the court will probably take judicial notice that he has such authority.

WILDE, C. J. I know of no such authority. Nor do I think we can dispense with the ordinary rule, without some affidavit showing that it cannot be complied with.

The rest of the court concurring,

Rule refused.(a)

(a) See *In re Rebecca Darling*, 2 Man. Gr. & S. 347; *In re Sophia Crawford*, 4 Man. Gr. & S. 628.

In re ELIZABETH ELLEN FOSTER. Jan. 25.

Where property is sold under the compulsory provisions of an act of parliament, that part of the rule of Hilary term, 4 W. 4, which directs inquiry to be made of a married woman at the time of acknowledging a deed to convey her interest under the 3 & 4 W. 4, c. 74, whether any provision is made for her in consideration of her so giving up her interest, is inapplicable.

HALL moved that the proper officer might be directed to receive and file a certificate of acknowledgment of the execution of a deed, under the 3 & 4 W. 4, c. 74, s. 79, by Sarah, the wife of Joseph Frith, Ann, the wife of Benjamin Rowley, Hannah, the wife of James Frith, and Elizabeth Ellen, the wife of Richard Thompson Foster.

*The affidavit verifying the certificate of acknowledgment, pursuant to the rule of Hilary term, 4 W. 4, stated, that, previous [*121 to the said Sarah, Ann, Hannah, and Elizabeth Ellen making the said acknowledgment, the deponent inquired of each and every of them the said Sarah, Ann, Hannah, and Elizabeth Ellen, whether she intended to give up her interest in the estate in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate; and that in answer to such inquiry, each of them the said Sarah, Ann, and Hannah, declared that she did intend to give up her interest in the said estate, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest, (a)—of which declaration of the said Sarah, Ann, and Hannah respectively, the deponent had no reason to doubt the truth, and he verily believed the same to be true; and that the said Elizabeth Ellen, in answer to such inquiry, declared that the purchase-money for her interest in the said estate was, she believed, paid into the Bank of England, by way of a provision for her, in consequence of her so giving up such her interest, in the said estate: and the deponent further said, that, before the acknowledgment of her the said Elizabeth Ellen was so taken, he was satisfied, and did then verily believe, that such provision had been made, (b) by payment into the Bank of England, in the name and with the privity of the accountant-general of the court of Chancery, "*ex parte* the Sheffield Town Trustees," of the purchase-money and value of such her interest in the said estate, in *pursuance of the lands clauses [*122 consolidation act, 1845, 8 & 9 Vict. c. 18, s. 69.(c)

(a) See *In re Dixon*, 4 Man. Gr. & S. 631; *Ex parte Webber*, 5 Ib. 179.

(b) But the affidavit did not state that the terms had been reduced into writing and produced to the commissioners.

(c) Which enacts, that—"with respect to the purchase-money or compensation coming to parties having limited interests, or prevented from treating, or not making title,"—"if the purchase-money or compensation which shall be payable in respect of any lands, or any interest therein purchased or taken by the promoters of the undertaking, from any corporation, tenant for life or in tail, married woman seized in her own right or entitled to dower, guardian or committee of lunatic or idiot, trustee, executor, or administrator, or person having a partial or qualified interest only in such lands, and not entitled to sell or convey the same, except under the provisions of this or the special act, or the compensation to be paid for any permanent damage to any such

The affidavit upon which this motion was founded, stated that the premises in question had been taken by the town trustees of Sheffield, under the statute 9 & *10 Vict. c. cccxviii., "An act for making *123] certain new streets or thoroughfares, and widening and improving certain other streets or thoroughfares, within the town and borough of Sheffield, in the county of York," and were part of the lands mentioned and contained in the second section of the act; that the same premises were conveyed to the trustees under the provisions contained in the said act and in the lands clauses consolidation act, 1845, therewith incorporated; (a) and that the purchase-money for the respective interests of James Frith and of Elizabeth Ellen Foster, the wife of Richard Thompson Foster, amounting to 530*l.* (being 265*l.* for the interest of each of the said parties) was paid into the Bank of England on the 6th of November, 1848, by the said town trustees, under the 8 & 9 Vict. c. 18, intituled "An act for consolidating in one act certain provisions usually inserted in acts authorizing the taking of lands for undertakings of a public nature," in the name and with the privy of the accountant-general of the court of Chancery, to be placed to his account there, *Ex parte* the said Sheffield town trustees.

The registrar had objected that the affidavit of verification did not comply with the rule, which, amongst other things, provides, that, "where any provision has been agreed to be made, the deponent shall state that the same has been made by deed or writing, or, if not actually made before, that the terms of the intended provision have been reduced into writing," &c.

Hall submitted that the rule did not apply to a case of this sort, where the sale was not by agreement. [MAULE, J. The married woman cannot be said to concur in the conveyance: it is *compulsory*. . Does the local act direct how the money is to be disposed of?] Only by reference to the lands clauses consolidation act, 1845.

lands, amount to or exceed the sum of 200*l.*, the same shall be paid into the bank, in the name and with the privy of the accountant-general of the court of Chancery in England, if the same relate to lands in England or Wales, or the accountant-general of the court of Exchequer in Ireland, if the same relate to lands in Ireland, to be placed to the account there of such accountant-general, *ex parte* the promoters of the undertaking (describing them by their proper name), in the matter of the special act (citing it), pursuant to the method prescribed by any act for the time being in force for regulating moneys paid into the said courts; and such moneys shall remain so deposited until the same be applied to some one or more of the following purposes, that is to say,—In the purchase or redemption of the land-tax, or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes;—or, in the purchase of other lands, to be conveyed, limited, and settled upon the like uses, trusts, and purposes, and in the same manner as the lands in respect of which such money shall have been paid, stood settled;—or, if such money shall be paid in respect of any buildings taken under the authority of this or the special act, or injured by the proximity of the works, in removing or replacing such buildings, or substituting others in their stead, in such manner as the court of Chancery shall direct;—or, in payment to any party becoming absolutely entitled to such money."

(a) By s. 1 of the local act.

*WILDE, C. J. The rule of court clearly does not apply to a case like this. The documents may be received. [*124

Hall. There is another objection which may be taken by the officer, viz. that there is a supplemental affidavit upon *paper*, whereas the practice requires that it should be upon *parchment*. In *Ex parte Carr*, 5 Man., Gr. & S. 496, this court decided, twelve months ago, that the affidavit might be upon *paper*. (a)

WILDE, C. J. If this court decided twelve months ago that an affidavit upon paper would do, there will be no objection at the office on that ground. *Fiat.*

(a) *Ex parte Carr* was the case of an acknowledgment to bar dower: it was not therefore, a decision to the extent stated.

In the case at bar, however, the point did not arise; for the affidavit was, in truth, a mere affidavit to ground the motion to the court, and not, as stated, a "supplemental" affidavit. It was no part of the proceedings, and would properly be filed in a different office.

*DOE *d.* CHIPPENDALE and Others *v.* ROE. Jan. 29. [*125

In ejectment to recover possession of several houses comprised in one lease, the court, as to some of them, granted a rule nisi for judgment against the casual ejector, upon an affidavit showing service of the declaration and notice, by affixing copies on the outer doors, the premises being unoccupied and shut up, and by serving two persons who claimed to be assignees respectively of part of the premises, and the attorney of one of them; and they afterwards made the rule absolute, upon affidavit of the service thereof in the same way.

CHANNELL, Serjt., moved for judgment against the casual ejector. The premises consisted of eight houses, numbered respectively 12, 13, 14, 15, 16, 17, 18, and 19, in Little James Street, Marylebone. As to Nos. 13, 15, and 16, the service was either upon the tenants in possession personally, or upon their respective wives, upon the premises. As to Nos. 12 and 14, the affidavit stated that the premises were unoccupied and shut up, and that the deponent being unable to discover the last tenants in possession thereof, affixed a copy of the declaration and notice on the door of each of the houses, such notices being directed to Hannah Elizabeth Woodford, the landlady thereof as hereinafter mentioned. And, as to Nos. 17, 18, and 19, the affidavit stated that they were uninhabited, deserted, and shut up, and in a very dilapidated state, and that the deponent, being unable to discover the last tenants in possession of such three last-mentioned houses, affixed a copy of the declaration and notice on the respective outer doors, directed to Phoebe Hall, the landlady thereof as hereinafter mentioned. The affidavit then went on to state, that *the whole of the premises were comprised in and held under one lease thereof* granted in the year 1808 to one Robert Drinkwater, for a term not yet expired by effluxion of time, but that the deponent had been informed, and believed, that such a lease was forfeited; that the said Hannah Elizabeth Woodford was, as the deponent had been informed, and believed, the assignee of such lease [*126

as regarded the houses Nos. 12, 13, and 14; that the said Phœbe Hall, as the deponent had been informed, and believed, was the assignee of such lease as regarded the houses numbered 15, 16, 17, 18, and 19; that the said Hannah Elizabeth Woodford and Phœbe Hall were respectively duly served with copies of the said declaration and notice; and that one Charles Hall, the son of Phœbe Hall, who collected her rents, informed the deponent, on the 9th instant, that several of the copies of the declaration and notice so served and affixed by the deponent, and which had been received by him the said Charles Hall from several of the tenants, had been given over by him the said Charles Hall, to Mr. Arundell, who the deponent knew to be the solicitor of the said Phœbe Hall, from his having corresponded in that capacity with the attorneys for the lessors of the plaintiff respecting that portion of the premises of which the said Phœbe Hall claimed to be the owner.

The learned serjeant referred to Doe *d.* Pope *v.* Roe, 7 M. & G. 602, 8 Scott, N. R. 321, where, in ejectment for seven houses adjoining each other, and all held under one lease, the tenants of four of them having been duly served, the court granted a serviceable rule absolute as to the other three, which were empty, upon an affidavit stating that the tenant [the lessee] had died intestate and insolvent, and that copies of the declaration and notice had been affixed on the outer doors of the three houses, and a copy served on one D., the attorney for one Jones, who had been accustomed to receive the rents; and he submitted, that, though not precisely similar in its facts, it was an authority for the present motion.

*127] *WILDE, C. J. In that case the lessee had gone to America. (a) Here, your affidavit does not show what has become of Drinkwater, the lessee.

MAULE, J. The premises being all held under one lease, the lessor of the plaintiff need not proceed as upon a vacant possession: Doe *d.* Timothy *v.* Roe, 8 Scott, 126.

WILDE, C. J. Take a rule absolute as to the premises in respect of which the service has been regular; and, as to the rest, a rule nisi,—the service to be by affixing a copy on the door or other conspicuous part of the houses, and by serving a copy on Hannah Elizabeth Woodford and Phœbe Hall, and also upon Mr. Arundell.

On a subsequent day, upon affidavit of service in the manner directed, the rule was made

Absolute.

(a) The marginal note so states, but mistakenly: the circumstance of the tenant having absconded to America, in truth, occurred in Doe *d.* Osbaldiston *v.* Roe, a case which is cited in Doe *d.* Pope *v.* Roe.

DOE *d.* BENNET *v.* ROE. Jan. 31.

The Court granted a rule for judgment against the casual ejector, where the premises were held under lease by several persons trading under the firm of W., F., & Co., upon an affidavit of service of the declaration and notice upon the manager of the works, upon the premises, and of personal service on one of the firm,—the affidavit stating them to be joint-tenants of the premises.

HEWSON, on a former day in this term, obtained a rule nisi for judgment against the casual ejector, upon an affidavit stating that the deponent, on the 5th *of January, 1849, served Michael Williams, [*128 one of the clerks in the office of Messrs. Williams, Foster & Co., tenants in possession of the premises mentioned in the declaration annexed, with a true copy of the said declaration and notice; that the said office is at the copper-works of the said Messrs. Williams, Foster & Co., part of which said works were on the premises mentioned in the declaration; that the deponent had been informed, and believed, that the said company called Williams, Foster & Co., consisted of the several persons named in the notice thereunto annexed, viz. John Williams, Michael Williams, William Williams, John Michael Williams, Collan Harvey, Richard Harvey, Joseph Talwyn Foster, Sampson Foster, and John Sampson, and that they were *joint-tenants* of the premises mentioned in the declaration, a lease of the premises sought to be recovered in this action having been granted to the said John Williams, Michael Williams, William Williams, John Michael Williams, Collan Harvey, Richard Harvey, Joseph Talwyn Foster, Sampson Foster, and John Sampson, jointly, on the 8th of September, 1838; that the deponent had occasion to go to the said works of the said company on the 6th of January, 1849, when he saw James Pooley, the agent and manager of the said works, who produced to the deponent the said declaration and notice, and informed him that he the said James Pooley was about enclosing them to Joseph Talwyn Foster, one of the partners in the said firm of Williams, Foster & Co., and acquaint him of the service thereof; that the said James Pooley also informed the deponent, that the only partner in the said company with whom he held communication relative to the business of the said company's copper-works, was, the said Joseph Talwyn Foster; and that the deponent, on the 9th of January, 1849, personally *served the said Joseph Talwyn Foster with a true [*129 copy of the said declaration and notice.

Channell, Serjt., on behalf of three of the parties,—Michael Williams, Richard Harvey, and Sampson Foster,—showed cause, upon affidavits that neither of them had been served with any declaration, or had any notice or knowledge of any ejectment having been brought against the firm, until served with the rule nisi; and also an affidavit of one of the attorneys of Williams, Foster & Co., stating, that he was served with the rule nisi on the 27th instant; that the members of the firm of Wil-

liams, Foster & Co., are resident at various places: that he had written to the various members, and had received from Michael Williams, Sampson Foster, and Richard Harvey, respectively, affidavits in opposition to the rule, but had received no affidavits from the other members of the firm; that he was unable to obtain a copy of the affidavit upon which the rule was obtained, until the 30th instant, and that, until he obtained an office copy of such affidavit, he was ignorant that it was alleged therein that the several persons therein named were joint-tenants of the premises for the recovery whereof this action was brought; that he had been informed, and believed, that two of the persons named in the said affidavit, viz. Collan Harvey and John Sampson have been long deceased; that Michael Henry Williams, who was a partner in the said firm of Williams, Foster & Co., was not named in the affidavit upon which this rule was obtained, or in the notice to appear subjoined to the declaration in this action; that Joseph Talwyn Foster is not the managing or sole acting partner in the said firm; and that, although by reason of his the said Joseph Talwyn Foster's being resident in London, he generally acted in
 *130] the London business of the said firm, there *were other partners resident in Cornwall who took at least as active a part in the general management of the business and concerns of the firm. The learned serjeant submitted that this was an attempt to fix all the parties by service upon one of them, without any evidence whatever to warrant the assumption that they were joint-tenants.

Hewson, in support of his rule. We rely upon the service of the declaration and notice upon Joseph Talwyn Foster, one of the joint-tenants, and the most active and prominent member of the firm. The case is not affected by the death of two of the partners, and the introduction of another. In *Doe d. — v. Roe*, 1 D. & L. 873, where the proprietors of a company, not incorporated, were tenants, and a third person was in actual occupation of a piece of land for which the ejectment was brought, service of the declaration on several of the proprietors, and on the clerk and treasurer of the company, and on the occupier, was held sufficient service,—it being sworn that the proprietors of the company were believed to be joint-tenants of the land in question. [MAULE, J. The service was upon the manager of the works, upon the premises, and there was also personal service on a member of the firm. WILDE, C. J. The affidavits in opposition to the rule do not deny that the parties are tenants in possession as alleged. *Channell*, Serjt. The rule being served so very recently, there has in reality been no time to answer the affidavit.]

WILDE, C. J. I incline to think the affidavit in this case is sufficient to entitle the plaintiff to judgment. The case of *Doe d. — v. Roe*, 1 D. & L. 873, seems to be an authority.

The rest of the court concurring,

Rule absolute.

*BAKER v. COGHLAN. Jan. 31.

[*131]

The endorsement of the time of service of a writ of summons, pursuant to the statute 2 W. 4, c. 39, s. 1, and the rule of court of M. T., 3 W. 4, r. 3, may be made by a marksman.

In this case an order was made by COLTMAN, J., at chambers, to set aside the appearance entered for the defendant, sec. stat., and all subsequent proceedings, for irregularity, on the ground that the endorsement of service on the original *alias* writ of summons, was not written by the party by whom the writ was served, she being unable to write, but having placed her mark at the foot of such endorsement,—the learned judge considering that this was not a sufficient compliance with the statute and rule of court.

The statute 2 W. 4, c. 39, s. 1, which provides for the service of the writ of summons, directs that “the person serving the same shall and is hereby required to endorse on the writ the day of the month and week of the service thereof:” and the rule of Michaelmas term, 3 W. 4, r. 3, provides “that the person serving a writ of summons shall within three days at least, after such service, endorse on such writ the day of the week and month of such service; otherwise, the plaintiff shall not be at liberty to enter an appearance for the defendant according to the statute; and every affidavit upon which such an appearance shall be entered shall mention the day on which such endorsement was made.”

Hawkins, on a former day in this term, moved for a rule to show cause why the above order should not be set aside, upon an affidavit of Hannah Baker, the wife of the plaintiff, and the person who served the writ, stating, “that, previously to the deponent serving the defendant with the copy *alias* writ of summons in this *action, this deponent read over and well understood the purport and effect of the [*132 same; that, previously to attaching her mark to the endorsement of service on the original *alias* writ of summons, she, this deponent, read over and well understood the printed and written words contained in the said endorsement of service; and she, this deponent, further saith that she is well able to read writing and printing, and is in the constant habit of perusing letters and papers connected with her husband, the said plaintiff's, business as a tailor and breeches-maker.” [WILDE, C. J. Is there any memorandum accompanying the endorsement, showing that what she attested by affixing her mark to it, was read over and explained to her? I do not think the want of that could be helped by a subsequent affidavit.] The rule as to that only applies to jurats.(a) [WILDE, C. J. Persons who cannot strictly comply with the rule, should not be employed to serve process. MAULE, J. If this person were indicted for injury in the affidavit of service, it would probably be said, that she

(a) See 2 Archb. Pr. 8th edit., by Chitty, p. 1454.

was only a poor ignorant markswoman, who could not very well understand the nature of what she was doing. The object of the rule of court is, to pin the party to a precise date of service. It is much more likely that mistake or shuffle will be avoided by holding that the endorsement must be *written* by the party effecting the service. It would probably be a construction more consonant with the spirit of the rule. However, there may be some doubt about it.]

A rule nisi having been granted,

Piggott now showed cause. He submitted that the endorsement in question was no compliance with the statute and rule of court, which *133] evidently intended that *the person serving process should not be so grossly illiterate as to be unable to make the required endorsement himself.

Hawkins was not heard upon this point.

WILDE, C. J. We must read the words of the statute which require the endorsement, as we would read the same words elsewhere. The endorsement of a bill or note, or the execution of any other contract, may be by a mark. I should incline to say, therefore, that this must be taken to be the endorsement of the party. I do not see the extent of the consequences of holding the act not to be complied with, unless the whole of the endorsement is in the handwriting of the person serving the writ. The conclusion I have come to, therefore, is, that the act is complied with where all but the mark is either printed or in the handwriting of a stranger. The party putting his mark to it thereby becomes responsible for the whole. This objection, therefore, fails.

The rest of the court concurring,

The rule was referred to the master upon another point.

*134] *DOE *d.* DIXON *v.* ROE. Jan. 31.

In ejectment brought upon a right of re-entry, under the 4 G. 2, c. 28, s. 2, it must appear that the landlord had a power to re-enter, *in respect of the non-payment of half a year's rent*, at the time of affixing the declaration and notice upon the premises.

THIS was an action of ejectment brought to recover the possession of a messuage, &c., in the parish of St. Mary Abbots, Kensington, which had been held by one Samuel Marks under and by virtue of a lease, bearing date the 13th of September, 1847, at the yearly rent of 200*l.*, payable quarterly, on the usual quarter-days. The lease contained a clause of re-entry for non-payment of the rent within twenty-one days next after any of the days whereon the same ought to be paid, or for other breach of covenant.

*135] *Hawkins* moved, under the 4 G. 2, c. 28, s. 2, (a) for *judgment

(a) Which enacts, "that, in all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may,

against the casual ejector, upon an affidavit showing that the premises were deserted, that there was due, in respect of *half a year's rent* at *Christmas day* last, the sum of 100*l.*, that there was no sufficient distress upon the premises, that the landlord had a right of re-entry under the lease, and that the declaration and notice had been served on the 10th instant, in the manner prescribed by the statute. [CRESSWELL, J. The landlord can have no right of re-entry for non-payment of the half-year's rent, the twenty-one days not having elapsed at the time of affixing the declaration and notice. The statute says that there shall be half a year's rent in arrear, and that the landlord shall have a right to re-enter for the non-payment *thereof*.] He has a right to re-entry by the terms of the lease, and half a year's rent is in arrear; and that satisfies the words of the act.

WILDE, C. J. The case is not brought within the words of the statute. The right of re-entry must be for non-payment of the half year's rent.

The rest of the court concurring,

Rule refused.

without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises, or, in case the same cannot be legally served, or no tenant be in actual possession of the premises, then to affix the same upon the door of any demised messuage, or, in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such declaration in ejectment; and such affixing shall be deemed legal service thereof; which service or affixing such declaration in ejectment shall stand in the place and stead of a demand and re-entry; and, in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall be made to appear to the court where the said suit is depending, by affidavit, or be proved upon the trial, in case the defendant appears, that *half a year's rent* was due before the said declaration was served, and that no sufficient distress was to be found on the demised premises countervailing the *arrears then due*, and that the lessor or lessors in ejectment had power to re-enter; then, and in every such case, the lessor or lessors in ejectment shall recover judgment and execution (i. e. shall, in the name of the plaintiff in ejectment, suing as on the demise of such lessor or lessors, recover, &c.), in the same manner as if the rent in arrear had been legally demanded, and a re-entry made."

See *Doe d. Powell v. Roe*, 9 Dowl. P. C. 548; *Doe d. Gretton v. Roe*, 4 Man. Gr. & S. 576.

**In re* CATTLIN. Jan. 31.

[*136

By a judge's order (made a rule of court), A., the former attorney of B., was directed within ten days to deliver to C. & D., B.'s present attorneys, a bill of costs, &c.:—Held, that an attachment could not issue against A. for disobedience of the rule of court, upon a mere demand by a clerk of C. & D.

ON the 10th instant, an order was made by a judge at chambers, upon hearing the attorneys for Mrs. Briggs, and Mr. Cattlin in person, "that Cattlin do, within ten days, deliver unto Messrs. Borradaile & Dinsdale, Mrs. Briggs's present attorneys, a bill of costs in all causes and matters wherein he has been concerned for the said Mrs. Briggs," &c. This order was made a rule of court on the 22d: and, on the 24th,

J. Brown obtained a rule nisi for an attachment against Mr. Cattlin, for disobedience of this rule, upon an affidavit of a clerk to Messrs. Bor

radaile & Dinsdale, stating "that he did, on the 23d, personally serve Mr. Cattlin with a true copy of the rule, and at the same time showed him the original, *and demanded of him the bill of costs mentioned in the said rule*, but that Cattlin did not then deliver, nor had he since delivered either to the deponent or to the said Messrs. Borradaile & Dinsdale the bill of costs mentioned in the said rule, or any other bill of costs, of all causes and matters wherein he had been concerned for Mrs. Briggs in the said order named, but had wholly neglected so to do;" and also an affidavit of one of the firm of Borradaile & Dinsdale, negating the delivery of a bill to him or to his partner.(a)

Dearsley now showed cause, upon an affidavit that the bill had actually
 *137] been delivered before the rule for *the attachment was served. An attachment is not granted for the mere disobedience of a rule of court; it must appear that the default has been *wilful*. Besides, here has been no proper demand. None is shown to have been made at the time of the service of the *order*;(b) and the demand sworn to have been made when the *rule* was served, was not made by a person authorized to make it. In *Doddington v. Hudson*, 1 Bingh. 410, 8 J. B. Moore, 510, where the defendant was served with an order of court to reinstate forthwith premises belonging to the plaintiff,—it was held that an attachment could not issue against him for disobedience of the order, unless the service of it was accompanied with an oral demand of performance. GILFORD, C. J., there said: "All the authorities show, that, before an attachment can be enforced, the party proceeded against must be proved to have committed a wilful disobedience of the order of the court: as, in the case where a party engaged to pay money at a coffee-house between the hours of ten and twelve, he was bound to be there within the appointed time, and, if he failed, he could have no defence against an action; but, the law being otherwise with respect to an attachment, EYRE, C. J., with great reluctance, refused to compel performance by that means, considering the practice imperative which requires personal service of the rule, and a personal demand and refusal, before the party can be deemed in contempt.(c) It has been forcibly argued in the present case, that the analogy between an order for payment of money, and an order for the repair of an edifice, is not complete, and that the reasons which make a
 *138] demand *essential in the one case do not exist in the other: but the difficulty I feel, is, that, in order to justify an attachment, some wilful disobedience of the order of the court must be shown." And BURROUGH, J., said: "This being a criminal proceeding wilful disobedience of the order of court must be established before an attachment can issue." [WILDE, C. J. The demand, I apprehend, must be made by the person mentioned in the rule: a demand by a clerk will not do.

(a) See *Potter v. Back*, 8 Dowl. P. C. 872.

(b) None appears to have been necessary: nor was it necessary, for this purpose, even to serve the order: *Greenwood v. Dyer*, 5 Dowl. P. C. 255.

(c) *Brandon v. Brandon*, 1 Bos. & Pull. 394.

I certainly never knew an attachment granted upon such materials as these.]

J. Brown, in support of his rule, submitted, that the party had clearly been guilty of a contempt, in disobeying the rule of court; and that, this not being the case of a rule for payment of money, a demand by the attorneys themselves was not necessary.

WILDE, C. J. There clearly has been no such demand in this case, as the practice of the court requires, in order to bring a party into contempt. In *Doe d. Hickman v. Hickman*, 8 Dowl. P. C. 833, it was held, in this court, that an attachment will not issue against an attorney, for not delivering up papers pursuant to a rule of court, unless it be shown that the person making the demand, was duly authorized to do so, and that he stated that fact to the attorney. Whether the order is for the delivery of a bill, or for payment of money, makes no difference. The practice is in both cases the same.

The rest of the court concurring, Rule discharged with costs.

***MENIAEFF and Another v. READE and Another. [*139
READE and Another v. MENIAEFF and Another. Jan. 16.**

In assumpsit by the sellers against the buyers for the breach of two contracts for the shipment at a foreign port, of two several quantities of rye-meal, the declaration stated, that, "after the making of the said contracts, and before the performance of them, or of any part thereof, it was agreed between the plaintiffs and the defendants that the said two contracts should be deemed and taken to be, and to operate as, one contract, and should be performed as if the same had been one contract for the amount of the said two quantities of meal :—"

Held, that this allegation was not sustained by proof that the buyers had sent out *three vessels* to receive the meal, the first of which was not of capacity sufficient to take on board the quantity mentioned in the first contract, and that they had received a separate bill of lading of the cargo brought home by that vessel, and accepted a bill drawn on them for the stipulated proportion of that particular cargo.

The judge at the trial having refused to allow the declaration to be amended, by striking out the words "or of any part thereof,"—the court, to whom the propriety of that refusal was referred, declined to interfere.

By two contracts, entered into at different times, the defendants engaged to ship at Cronstadt, for the plaintiffs, 250 tons and 350 tons respectively of rye-meal,—each contract stipulating that, the shipment should be made at the first open water, allowing a fair and reasonable time for the arrival out of the vessel and getting the goods down to Cronstadt; that payment should be made one-third at three months from the date of bill of lading; but that, should the vessel not arrive in time for the goods to be shipped before the 30th of June, or the sellers not be able to procure a ship by that date, the sellers should draw for the remainder as specified above.

In an action by the buyers against the sellers for the breach of these two contracts, the defendants pleaded amongst other pleas, that the plaintiffs were not, at and after the arrival of the said vessels at Cronstadt, and from thence at and until a fair and reasonable time had elapsed for getting the goods down to Cronstadt, ready and willing to buy and accept and pay for the meal, in manner and form as alleged; and that the plaintiffs had not performed the said contracts and promises in all things on their part to be performed, in manner and form as alleged :—

Held, that the circumstance of the buyers' having sent out *three vessels*, neither of which was of capacity sufficient to take on board the quantity mentioned in either contract, and which arrived at the port of loading at different times, did not entitle the defendants to a verdict upon these two issues; but that the buyers were entitled to maintain an action against the sellers, although they had not sent out *one vessel* to receive the quantity mentioned in each contract.

THE case of *Meniaeff v. Reade* was an action of assumpsit upon two contracts for the sale by the plaintiffs to the defendants of Russian rye-meal.

The declaration stated, that, on the 4th of March, 1847, by a certain contract or agreement then made between the plaintiffs and the defendants, the plaintiffs agreed to sell to the defendants, and the defendants agreed to buy of the plaintiffs, a large quantity, to wit, 250 tons (20 tons more or less to be no object) of Russian kiln-dried rye-meal in mat bags, and in good condition when shipped, at 8*l.* 7*s.* 6*d.* per ton, free on board at Cronstadt, that is to say, at a certain place in parts beyond the seas, to wit, in the empire of Russia, called Cronstadt: shipment to be made at the first open water, allowing a fair and reasonable time for the arrival out of the vessel, and getting the goods down to Cronstadt: the sellers (if required by the buyers) to take up ship room at St. Petersburg, at the current rate of freight, for account of the buyers: to be paid for by *140] the buyers' *acceptances of the sellers', or agent's drafts, one third of the above sale at three months from date of contract, and the remainder by their acceptance at three months from date of *bill of lading*, on handing the same: but, should *the vessel* not arrive in time for the meal to be shipped by the 30th of June then next, or the sellers not be able to procure *a ship* by that date, then the sellers were to be at liberty to draw for the remainder, as specified above: should the exportation of rye-meal be prohibited from St. Petersburg, so as to prevent the shipment of the same, then the said contract was to be void, the money paid in advance to be returned (the due return of which the agent thereby undertook): and it was thereby further agreed, that, in case of any dispute as regarded quality, the same was to be left to the arbitration of two respectable parties in London, with liberty to call in a third, whose decision was to be final: That also theretofore, to wit, on the 9th of March, 1847, by a certain other contract or agreement then made between the plaintiffs and the defendants, the plaintiffs agreed to sell to the defendants, and the defendants agreed to buy of the plaintiffs, a large quantity, to wit, 350 tons [setting out a second contract in precisely the same terms as the first]; That, after the making of the said contracts or agreements, and *before the performance of them, or any part thereof*, to wit, on the said 9th of March, 1847, it was agreed between the plaintiffs and the defendants, that the said two contracts or agreements should be deemed and taken to be, and to operate as one contract or agreement for the sale of the two quantities of rye-meal therein mentioned, and should in all respects be performed and fulfilled by them the plaintiffs and the defendants respectively as if the same had been one contract for the sale of the amount of the said two quantities of meal upon the terms therein mentioned: That thereupon, afterwards, to wit, on the *141] *day and in the year last aforesaid, in consideration of the premises, and that the plaintiffs then promised the defendants to

perform and fulfil the said two contracts, *so deemed and taken as aforesaid as one contract*, in all things on their parts, they the defendants undertook and faithfully promised the plaintiffs to perform and fulfil the same, *so likewise deemed and taken as aforesaid as one contract*, in all things on their part; That, after the making of the said promise, to wit, on the day and in the year last aforesaid, they the defendants did, in pursuance of the said contracts, send and despatch *three* vessels, called, to wit, the Margaret Roberts, the Rienzi, and the Concordia, to Cronstadt aforesaid, and that the said vessels afterwards, and long before the 30th of June, 1847, to wit, on the 1st of June in the year aforesaid, arrived at Cronstadt aforesaid, and were then ready to receive the said quantities of rye-meal mentioned in the said contracts or agreements: That the plaintiffs did afterwards, and before the said 30th of June, to wit, on the 1st of June, 1847, in pursuance of the said promise on their parts, ship free on board the said ships, at Cronstadt aforesaid, the said quantities in the said agreements mentioned, of Russian kiln-dried rye-meal, in mat bags, sweet and in good condition, that is to say, 166 tons and four equal seventh parts of a ton of rye-meal, on board the said ship called the Margaret Roberts, 187 tons and three equal seventh parts of a ton, on board the said ship called the Concordia, and 264 tons and five equal seventh parts of a ton, on board the said ship called the Rienzi; and that such quantities of rye-meal were so shipped by them the plaintiffs, at the first open water after the making of the said contracts or agreements, allowing a fair and reasonable time for the arrival out of the said vessels, and for getting the goods down to Cronstadt, within the true intent and meaning of the said contracts or *agreements: That, after the making of the said promise, to wit, on the said 9th of March, 1847, they the defendants, in part [*142 performance of the said promise on their parts, did accept certain bills of exchange, to the amount, to wit, of one-third of the said price of the said quantities of rye-meal so agreed to be sold as aforesaid, to wit, to the amount of 1675*l.*: That afterwards, and within a reasonable time after the said quantities of rye-meal were so shipped on board the said ships as aforesaid, to wit, on the 1st of July, 1847, they the plaintiffs caused the bills of lading for the quantities so shipped on board the vessels called the Margaret Roberts and the Concordia, to be delivered to the defendants, and were then and at all reasonable times ready and willing to deliver to them the bill of lading for the said quantity so shipped on board the said ship called the Rienzi, upon their the defendants' paying for the said rye-meal by accepting bills of exchange for the same according to the said agreements and promise in that behalf,— That thereof the defendants then, to wit, on the day and year last aforesaid, had notice: That the price of the said quantities of rye-meal so shipped as aforesaid, according to the terms of the said agreements, amounted to a large sum of money, to wit, the sum of 5194*l.* 12*s.* 6*d.*,

and that they the plaintiffs did, in pursuance of the said agreements, after the said rye-meal had been so shipped, to wit, on the 1st of July, 1847, draw three certain bills of exchange upon the defendants, which said bills of exchange were such bills of exchange, and bore respectively such dates, and were payable at such times, as were in the said agreements in that behalf mentioned, and which said bills of exchange were for sums amounting together to the sum of 3519*l.* 12*s.* 6*d.*, being the difference between the said price of all the said rye-meal so shipped, and *143] the said sum, to wit, of 1675*l.*, so *paid by the defendants in manner aforesaid: And that they, the plaintiffs, did afterwards, and after the said two bills of lading had been delivered to the defendants as aforesaid, and at a reasonable time in that behalf, to wit, on the 1st of July, 1847, request the defendants to accept the said bill of lading for the said rye-meal so shipped on board the ship called the *Rienzi* as aforesaid, and to pay them the plaintiffs for all the said rye-meal so shipped, by accepting the said three last-mentioned bills of exchange, according to their said promise in that behalf: Yet that the defendants, not regarding their said promise, although they then accepted one of the said bills of exchange, to wit, the said bill of exchange for 931*l.* 6*s.* 8*d.*, did not nor would accept the said last-mentioned bill of lading, and did not nor would accept the said two other bills of exchange, or either of them, but had hitherto wholly refused so to do, and that, except as to the said bill of exchange for 931*l.* 6*s.* 8*d.*, the said rye-meal still remained wholly unpaid for.

The defendants pleaded,—first, non-assumpsit,—secondly, that the said quantities of rye-meal in the declaration mentioned, were not shipped by the plaintiffs at the first open water after the making of the said contracts or agreements, allowing a fair and reasonable time for the arrival out of the said vessels, and for getting the goods down to Cronstadt, within the true intent and meaning of the said contracts or agreements, in manner and form as in the declaration alleged; concluding to the country.

The cause was tried before WILDE, C. J., at the sittings in London, after the last term. The facts were as follows:—

On the 4th and 9th of March, 1847, one George Draper, a merchant, in London, as agent for the *plaintiffs, entered into the following contracts with the defendants, through one Smith, a broker:—

“Sold for Messrs. P. Meniaeff & Son, of St. Petersburg, by order of George Draper, of London, to Messrs. Reade & Grove, of London, 250 tons (20 tons more or less to be no object) of Russian kiln-dried rye-meal, in mat-bags, sweet, and in good condition, when shipped, at 8*l.* 7*s.* 6*d.* per ton, free on board at Cronstadt. Shipment to be made at the first open water, allowing a fair and reasonable time for the arrival out of the vessel, and getting the goods down to Cronstadt. The sellers (if required by the buyers) to take up ship-room at St. Petersburg, at the

current rate of freight, for account of the buyers. To be paid for by the buyers' acceptances of the sellers', or agent's, drafts, one-third of the above sale at three months from date of contract, and the remainder by their acceptance at three months from date of *bill of lading*, on handing the same. But, should *the vessel* not arrive in time for the meal to be shipped by the 30th of June next, or the sellers not be able to procure a ship by that date, then the sellers are to be at liberty to draw for the remainder as specified above. Should the exportation of rye-meal be prohibited from St. Petersburg, so as to prevent the shipment of the above, then this contract is to be void, and the money paid in advance to be returned; the due return of which the agent hereby undertakes. In case of any dispute as regards quality, the same is to be left to the arbitration of two respectable parties in London, with liberty to call in a third, whose decision is to be final."

The second contract was similar in all respects to the above, except that the quantity of rye-meal contracted for was 350 tons.

Upon the first contract being entered into, Draper, as agent of the plaintiffs, drew upon the defendants, and *they accepted, a bill, [*145 dated the 4th of March, 1847, for 697*l.* 18*s.* 6*d.*, being one-third of the estimated amount of the money to be paid for the meal comprised in the first contract, and, on the 21st of March, 1847, he drew another bill of exchange, for 977*l.* 1*s.* 8*d.*, being one-third of the estimated amount of the money to be paid for the goods comprised in the second contract, payable, respectively, three months after date; and which bills, making together 1675*l.*, were duly paid at maturity.

The defendants chartered three vessels, respectively named the Margaret Roberts, the Concordia, and the Rienzi, to proceed to Cronstadt, and load the quantities of rye-meal mentioned in the said two several contracts.

The Margaret Roberts arrived at Cronstadt on the 9th of May, and was declared ready to load on the 17th, and completed her loading on the 28th, went to sea on the 31st,^(a) was loaded with 166 4-7 tons of rye-meal, and the bill of lading for the same was transmitted to London, and delivered to the defendants, who received and disposed of the cargo; and they accepted Draper's drafts for 500*l.* and 431*l.* 6*s.* 8*d.*, respectively, dated the 8th of June, 1847, and making together 931*l.* 6*s.* 8*d.*, being the amount of the remaining two-thirds of her cargo after appropriating 465*l.* 13*s.* 4*d.*, part of the sum of 697*l.* 18*s.* 4*d.*, the amount of the bill of exchange dated the 4th of March, already drawn for the first third of the amount of the contract of that date; and such drafts for 931*l.* 6*s.* 8*d.* were paid by the defendants at maturity.

Draper, on the 31st of May, 1847, gave the defendants notice of the arrival of the Margaret Roberts at Cronstadt; and on the 21st of June, he addressed them as follows:—

(a) These four dates are according to the old style.

*[146] *Messrs. Reade & Grove,

"Gentlemen,—I beg to inform you that I am advised by Messrs. P. Meniaeff & Son, of St. Petersburg, that, on the (29th of May) 10th of June, the three vessels chartered by you for the rye-meal sold to you, had arrived; and that, on the (30th of May) 11th of June, they had loaded the Margaret Roberts, of whose cargo I hand you inclosed invoice, amounting to your debit 1397*l.* I enclose bill of lading of the same, and copy of charterparty, endorsed with the number of lay days consumed in lading. On your agreeing the amount of invoice, I shall value on you at three months from date of bill of lading,—say (27th of May) 8th of June. After deducting one-third of the amount included in your acceptance of my draft of 4th March, for 697*l.* 18*s.* 4*d.* Say, amount of invoice, 1397*l.*; less one-third, 465*l.* 13*s.* 4*d.* = 931*l.* 6*s.* 8*d.* You will oblige me by informing me if you find this amount correct.

"Yours, &c.

(Signed)

"GEORGE DRAPER."

The Rienzi arrived at Cronstadt on the evening of the (17th) 29th of May, and was declared to be ready to load on the (29th of May) 10th of June: and the Concordia arrived on the (28th of May) 9th of June, and was declared ready to load on the (4th) 16th of June.

In consequence of the great influx of vessels to that port in the season of 1847, and the large quantities of grain and rye-meal shipped from thence, it was impossible to despatch them with the expedition that would have been used in other years; and lighters could not be obtained to convey such large quantities of grain down the Neva to Cronstadt: and, in consequence of these difficulties, although every effort was made to despatch these vessels, the loading of the Rienzi was not completed until the (4th) 16th of July, and *that of the Concordia until the *147] (26th of June) 8th of July.

The Concordia took 187 3-7 tons, and the Rienzi 264 5-7 tons.

On the 12th of July, 1847, the defendants wrote to Draper as follows:—

"Dear Sir,—We beg to inform you that we have lately received several letters from the Irish houses for whose account we purchased rye-meal, complaining of the great delay in the shipment of the same per Rienzi and Concordia. The buyer of the Rienzi's cargo intimates his intention not to receive the documents, your friends at St. Petersburg not having made the shipment in due course. And the buyer of the Concordia's cargo has, we regret, been compelled to suspend payment. Waiting your instructions in this matter,

(Signed)

"We remain, &c.

"READE & GROVE."

To this Draper replied, on the following day, as follows:—

"Messrs. Reade & Grove,

"Dear Sirs,—As regards the two parcels of rye-meal you purchased

of me, you are aware that you provided ship-room, and that the parties for whose account I sold the same are not bound to ship them by any specified time: and I beg to inform you that they have used and are using all possible despatch in putting them on board. With the great influx of vessels at the port of Cronstadt this season, owing to the unusual export of corn from thence, shipments of goods do not go on so fast, perhaps, as usual; but no delay has occurred on the part of the sellers, whose goods were ready at St. Petersburg before the vessels arrived, and whose interest it is to have them shipped as quickly as possible. I should regret if you experience any trouble with the houses for whom you bought, but with whom *I or my friends are not concerned. I shall, nevertheless, be ready to render you all the assistance in [*148 my power, to enable you to compel them legally, if necessary, to the honourable fulfilment of their engagements. Touching your remark, that you are waiting my instructions, I have none to give, and can but refer you to what I have already stated.

"Yours, &c.

(Signed)

"GEORGE DRAPER."

On the 17th of July, the defendants again wrote to Draper, as follows:—

"Dear Sir,—We beg to acknowledge receipt of your favour of the 13th, the contents of which we communicated to Mr. C. Sugrue, of Cork, the party for whom we purchased the cargo of rye-meal that should have been shipped by the Rienzi, and from whom we have to-day received a reply, the purport of which you will perceive on reading the extract from his letter given at foot.

"Referring to your respects of the 13th, wherein you say that no time is specified for the shipment of the goods purchased of you, we beg to refer you to your contract, which states that the shipment shall be made 'at first open water;' and, as our vessels were at Cronstadt shortly after,—the Rienzi on the 18th of May, by your own advice,—we quite agree with our Irish correspondent in thinking that the shipments have not been made in due course, and that the delay is unjustifiable, depriving the buyer of all chance of disposing of the cargoes before the coming harvest. All other purchases that we made on exactly similar terms, have been shipped more than a month since, and the vessels arrived and discharged at their various ports of destination; among others, the Margaret Roberts (loaded by your friends, Messrs. Meniaeff & Co.) arrived in Dublin last Monday week,—whose cargo, by *the by, was in [*149 very bad order, and great waste incurred, owing to the wretched condition of the mats, most of which were old and broken, and upon which point the captain states that he remonstrated with the shippers several times in vain. Referring to the extract at foot, we are, &c.,

"Yours, &c.

(Signed)

"READ & GROVE."

The extract from Sugrue's letter to the defendants, referred to above, was as follows:—

"I now beg again to call your attention to the subject of the rye-meal which you bought for me last March, and to confirm to you my determination to repudiate the contract, which has to all intents and purposes been broken by the seller, who cannot be justified for the great delay in making the shipment. I therefore request you will on no account accept the shipping documents, should they be presented to you now; but that you will forthwith obtain the repayment of the one-third advance which you came under for that contract; and that you will regularly notice the contractor, Mr. G. Draper, that I hold him accountable for the freight of the *Rienzi*, which vessel was at Cronstadt so early in May. I therefore beg of you to be quite peremptory and decisive on my part in this matter, and get back the advance without delay; for, I am resolved not to be forced to observe a contract which has not been fulfilled on the part of Mr. Draper or his connexions at St. Petersburg."

To this letter, Draper replied on the 20th of July, as follows:—

"Dear Sirs,—With regard to your observations to me about the delay of the shipment *per Rienzi*, I can but confirm to you what I said in my last on this subject, *viz.* that no delay has occurred on the part of my friends, and that the delay (if any) arises from the circumstance, this *150] year, of the immense transactions of *corn at St. Petersburg, rendering it impossible, with the ordinary means at command there (which sufficed for the business of that place hitherto), and the increased demand for lighters, labour, &c., and the immense influx of shipping, to get the goods down to Cronstadt as quickly as in former years. As to your correspondent expecting that I should return the advances made upon the purchase, the contract of which would be fulfilled, he cannot surely have been in earnest in making such a request. I may remark, that, had the rye-meal been shipped earlier, no advantage, considering the state of the markets, would have accrued, and no prejudice can arise, on the other hand, from its coming later. "Yours, &c.

(Signed)

"GEORGE DRAPER."

On the 23d of July, Draper sent the defendants the invoice and bill of lading for the *Concordia's* cargo; and, on the 27th, the invoice of the *Rienzi's* cargo. These (with the exception of the bill of lading of the goods *per Concordia*, which the defendants retained as security for the advance they had made on account of the cargo) were returned by the defendants on the 28th, on the ground that "the conditions of the contracts had not been complied with." And, on the 30th, bills for the balance were tendered to the defendants for acceptance, but refused; the defendants, on the other hand, demanding re-payment of the advances already made.

The *Concordia*, with her cargo of 187 3-7 tons of rye-meal on board,

arrived in London on the 30th of July; and the Rienzi, with her cargo of 264 5-7 tons, on the 15th of August.

On the part of the defendants, it was objected that there was no evidence to sustain the allegation in the declaration, that, "after the making of the said contracts or agreements, and *before the performance of them, or any part thereof*, it was agreed between the *plaintiffs and the defendants that the said two contracts or agreements should be [*151 deemed and taken to be, and to operate as, one contract or agreement for the sale of the two quantities of rye-meal therein mentioned, and should in all respects be performed and fulfilled by the plaintiffs and defendants respectively as if the same had been one contract for the sale of the amount of the said two quantities of meal upon the terms therein mentioned."

For the plaintiffs, it was insisted that the letters and acts of the parties were evidence of such an agreement.

The Lord Chief Justice intimating an opinion that there was no evidence of an agreement to deal with the two contracts as one, as alleged, the plaintiffs' counsel proposed to amend the declaration by striking out the words "or of any part thereof." This, his lordship declined to allow; and the jury having expressed an opinion that the vessels had not been loaded within a reasonable time after their arrival at Cronstadt, the plaintiffs elected to be nonsuited,—leave being reserved to them to move to set aside the nonsuit, if the court should be of opinion that there was evidence of such an agreement as that alleged, or that the amendment should have been allowed, and would have availed, if allowed.

Byles, Serjt., now moved according. The whole correspondence and acts of the parties clearly showed an implied understanding that the two contracts were to be dealt with as one. The buyers sent out three ships to receive the meal,—the first one not being of capacity sufficient to receive the whole quantity mentioned in the first contract. Separate bills of lading were given for each cargo; and the bills of exchange were in like manner drawn with reference to each specific cargo. It was evident, therefore, that the *parties were agreed, that, as far as concerned [*152 the performance of the contracts, they should be treated as one. [MAULE, J. That seems rather like splitting them into three. The facts show that the two contracts had been in part performed.] This stipulation is stated to have been made after the second contract had been entered into, but before performance,—which means performance by the plaintiffs in delivering the goods. [MAULE, J. How can you amalgamate the two contracts?] The real agreement was, that the whole should be taken as one contract, except as to the two bills already drawn. [MAULE, J. Suppose there had been one contract only. You must either do what you contract to do, or do something equivalent.] The amendment clearly ought to have been allowed. [MAULE, J. That would not have helped you.]

The case of *Reade v. Meniaeff* was a cross-action brought by the buyers against the sellers for not shipping the meal within a reasonable time.

*153] *The first count of the declaration,—which was founded upon the first contract,—stated, that, on the 4th of March, 1847, the defendants agreed to sell to the plaintiffs, and the plaintiffs agreed to buy of the defendants, a large quantity, to wit, 250 tons (20 tons more or less to be no object) of Russian kiln-dried rye-meal, in mat bags, sweet and in good condition when shipped, at 8*l.* 7*s.* 6*d.* per ton, free on board at Cronstadt, that is to say, in parts beyond the seas, to wit, at Cronstadt, in Russia; shipment to be made at the first open water, allowing a fair and reasonable time for the arrival out of *the vessel*, and getting the goods down to Cronstadt; the sellers, if required by the buyers, to take up ship-room at St. Petersburg, at the current rate of freight, for account of the buyers; to be paid for by the buyers' acceptance of the sellers', or agents' drafts,—one-third of the above sale at three months from the date of the contract, and the remainder by their acceptance at three months from the date of *the bill of lading*, on handing the same; but, should *the vessel* not arrive in time for the meal to be shipped by the 30th of June then next, or the sellers not be able to procure a *ship* by that date, then the sellers should be at liberty to draw for the remainder, as specified above. After setting out other stipulations in the contract, and averring mutual promises, the count proceeded to allege—that the plaintiffs did, afterwards, and within a reasonable time, to wit, on, &c., pay for one-third of the price of the said 250 tons of meal in the said contract mentioned, by their accepting the draft of G. Draper, the agent of the defendants, to wit, a bill of exchange dated on the day of the date of the said contract, and made and drawn by the said G. Draper, as agent of the defendants, and at their request, upon the plaintiffs, for the *154] payment to the *order of the said G. Draper of the sum of 697*l.* 18*s.*, being one-third of the price of the said 250 tons of meal, at three months after the date thereof, which was three months from the date of the said contract; that the defendants then took and received the said bill of exchange, so accepted by the plaintiffs, of and from them, in payment of the one-third of the price of the said 250 tons of meal as aforesaid, which said bill of exchange the plaintiffs duly paid on the day when the same became due; that the plaintiffs, within a reasonable time, to wit, &c., sent divers, to wit, three vessels, to Cronstadt aforesaid, for the said meal, to wit, a vessel called the *Margaret Roberts*, a vessel called the *Concordia*, and a vessel called the *Rienzi*, which said several vessels arrived at Cronstadt before the 30th of June aforesaid, to wit, on the 6th of May, in the same year, and in time for the said meal to be shipped by the said 30th of June; that, although the defendants, in part performance of their promise, duly shipped on board the *Margaret Roberts* 166 4-7 tons, part of the said meal, and the plaintiffs afterwards, to wit, on the 8th of June in the year aforesaid, accepted the said part of the said meal,

and then duly paid the defendants the remainder of the price of the said part of the said meal, by their accepting a bill of exchange drawn by G. Draper, the agent of the defendants, at their request, and dated the day and year last aforesaid, being the date of the bill of lading of the said part, for the payment to the order of the said G. Draper, at three months after the date thereof, of the sum of 931*l.* 6*s.* 8*d.*, being the remainder of the said price of the said part of the said meal, which last-mentioned bill the defendants then took and received as such payment, and the plaintiffs duly paid the same when due; and that, although the said vessels called the *Rienzi* and the **Concordia* were capable of receiving, loading, and carrying [*155 the remainder of the said meal, and the plaintiffs were, after the first open water, and before the 30th of June, in the year aforesaid, and at and after the arrival of the said vessels respectively at Cronstadt, and from thence until and at and after a fair and reasonable time had elapsed for getting the said goods down to Cronstadt, ready and willing to buy and accept the remainder of the said meal, and to receive the bill or bills of lading thereof, and to pay the remainder of the price thereof according to the said contract, and the plaintiffs' promise in that behalf, —of which the defendants always had notice; and although the plaintiffs had performed the said contract, and their said promise, in all things on their part to be performed, and although a fair and reasonable time for the defendants to ship the remainder of the said meal on board the said vessels had elapsed after the said first open water, and after the arrival of the said several vessels at Cronstadt aforesaid, and before the commencement of this suit, a fair and reasonable time for getting the said goods down to Cronstadt being allowed, and although the shipment of rye-meal was not prohibited from St. Petersburg, so as to prevent the shipment of the remainder of the said meal, or any part thereof: yet the defendants disregarded their promise, and did not nor would, at the first open water, allowing a fair and reasonable time [for the arrival out of the said vessels, and for getting the said goods down to Cronstadt, or within a fair and reasonable time] in that behalf, ship the remainder of the said meal, or any part thereof, on board the said vessels, or either of them, or on board of any other vessel or vessels, or in any way sell or deliver the remainder of the said meal to the plaintiffs within a fair and reasonable time *in that behalf, but wholly neglected and [*156 refused so to do, and therein wholly failed and made default; whereby the moneys paid to the defendants in part of the price of the said remainder of the said meal, and in discharge of so much of the said bills of exchange as were given on account of such price, became and were wholly lost to the plaintiffs, and divers moneys and expenses, amounting to a large sum, &c., which the plaintiffs laid out and incurred in and about hiring the said vessels, and sending them to Cronstadt aforesaid, became and were wholly lost and useless to the plaintiffs, and the plaintiffs lost divers great gains which might, and otherwise would,

have accrued to them from the said remainder of the said meal being shipped and delivered within such reasonable time as aforesaid.

The second count was upon a contract, in terms precisely the same, for 350 tons of rye-meal, and was similar in all respects to the first count, except that the words within brackets in the breach, *antè*, p. 155, were omitted.

There was also a count for money had and received, money paid, interest, and money found due upon an account stated.

The defendants pleaded,—first, that the plaintiffs did not pay for one-third of the price of the 250 tons of meal in the first count mentioned, by accepting the draft of the said G. Draper upon the plaintiffs for the payment to the order of the said G. Draper of the said one-third of the price of the said 250 tons of meal, nor did the defendants take or receive the said bill of exchange in the said first count in that behalf mentioned in payment of one-third of the said price of the said meal, in manner and form in the said first count alleged;—secondly, *that the plaintiffs were not, at and after the arrival of the said vessels at Cronstadt, and* *157] **from thence at and until a fair and reasonable time had elapsed for getting the goods down to Cronstadt, ready and willing to buy and accept and pay for the remainder of the said meal, in manner and form in the said first count alleged;*—thirdly, that the defendants had not notice that the plaintiffs were so ready and willing as in the said first count mentioned, in manner and form in the said first count alleged;—fourthly, *that the plaintiffs had not performed the said contract and promise in the said first count mentioned, in all things on their part to be performed, in manner and form as in the said first count alleged;*—fifthly, that they, the defendants, did, at the first open water, allowing a fair and reasonable time for getting the said goods down to Cronstadt, and within a fair and reasonable time in that behalf, ship the remainder of the said meal on board the said vessels in the first count mentioned, to wit, the *Rienzi* and the *Concordia*.

Similar pleas were pleaded to the second count, and non assumpsit to the third.

This cause also was tried before WILDE, C. J., at the sittings in London after the last term. The facts were substantially the same as in the last case.

At the close of the plaintiffs' case, it was objected, on the part of the defendants, that the plaintiffs had failed to prove the averments traversed by the second and fourth (and seventh and ninth) pleas, viz., that they were ready and willing to buy and to accept and pay for the remainder of the meal, and that they had performed the respective contracts in all things on their part to be performed; for that they could not be ready and willing to receive the meal, nor could they perform the contract, without sending out *one ship* to receive the quantity mentioned in each contract.

The learned judge overruled the objections, but *reserved to the defendants leave to move to enter a verdict for them upon those [*158 issues; and the jury found for the plaintiffs upon all the issues; answering in the negative these two questions,—first, whether, supposing the defendants not bound to have the goods ready before the arrival of the vessels, they had loaded them within a reasonable time after their arrival,—secondly, whether, supposing the reasonable time to run from the day when the vessels were declared ready to load, the defendants had loaded them within such reasonable time.

Byles, Serjt., now moved for a rule nisi accordingly. The plaintiffs in their declaration allege precise performance of the contracts as set out. They were therefore bound to prove performance as alleged. It clearly was no performance of the contract,—which speaks of “the vessel,” and “the bill of lading,” in the singular number,—to send out three vessels, to arrive at Cronstadt at different times. The evidence is, that the parties were performing a contract totally inconsistent with the contracts alleged in the declaration. This is not the case of a contract rescinded by mutual consent. Having been in part performed, the parties could not be placed *in statu quo*. The plaintiffs, therefore, are clearly not entitled to a verdict on the third count: *Hunt v. Silk*, 5 East, 449, 2 J. P. Smith, 15; *Taylor v. Hare*, 1 N. R. 260; *Beed v. Blandford*, 2 Y. & J. 278.

MAULE, J. With respect to the case of *Meniaeff v. Reade*, the court has already expressed a strong opinion that the nonsuit was right, inasmuch as there was no allegation in the declaration, that, before the *performance of any part of the contracts, it was agreed that the [*159 two should constitute one. It certainly is quite possible that the parties might have so contracted: but there is a total absence of evidence to show that they have done so. The obvious inconvenience of such an arrangement affords strong ground for thinking that none such was made. The words “before performance” are most material. It is quite clear there was no such agreement before the performance. I therefore think the lord chief justice was bound to nonsuit the plaintiffs.

As to the second action—*Reade v. Meniaeff*,—which is brought by the buyers against the sellers, the main point upon which the rule was asked for, is, that the plaintiffs did not show that they were ready and willing to accept and to pay for the meal. It does not appear to me that there was any evidence of that. One of the pleas was, that the plaintiffs were not ready and willing to receive and to pay for the meal; another was, that they had not performed the agreement in all things on their part to be performed. The latter plea is the one upon which the defendants mainly relied. It appears that the plaintiffs sent out three ships to Cronstadt and were ready to receive the meal on board; and there was nothing to show that they were not perfectly ready to accept the bills pursuant to the contract. The question upon both pleas turns mainly

upon the meaning of the contract,—whether the plaintiffs *could* perform all that they were bound to do by way of condition precedent, without sending out *one vessel* to receive the quantity of meal mentioned in each contract. The contracts were to this effect:—“Sold for P. Meniaeff & Son, 250 tons (20 tons more or less to be no object) of Russian kiln-dried rye-meal, in mat bags, sweet and in good condition when shipped, at 8l. 16s. 6d. *per ton*, free on board at Cronstadt. *Shipment to be made at the first open water, allowing a fair and reasonable time for the arrival out of *the vessel* and getting the goods down to Cronstadt. The sellers, if required by the buyers, to take up ship-room at St. Petersburg, at the current rate of freight, for account of the buyers: to be paid for by the buyers’ acceptance of the sellers’, or agent’s, drafts, one-third of the above sale at three months from the date of the contract, and the remainder by their acceptance at three months from the date of *the bill of lading*, on handing the same. But should *the vessel* not arrive in time for the meal to be shipped by the 30th of June then next, or the sellers not be able to provide a ship by that date, then the sellers should be at liberty to draw for the remainder, as specified above,” &c. The contract for the 350 tons was in similar terms.

Now, these are mercantile contracts between two dealers, for the shipment of goods from a foreign port. The substance of the contracts is, I think, this,—that 250 and 350 tons of meal respectively were to be shipped at Cronstadt, for Reade & Co. The defendants were to put it on board at Cronstadt: and, further, if required, were to take up ship-room at St. Petersburg, at the current rate of freight. That is a stipulation for the benefit of the buyers. The buyers were to pay for the meal, one-third by acceptance at three months from the date of the contract (which has been done), and the residue by acceptance at three months from the date of the bill of lading, on handing the same. There is no stipulation here, on the part of the buyers, that they will send a ship, or anything of the kind. But for an expression I will presently advert to, the effect would be, that the buyers might point out any reasonable mode of shipping the goods they pleased,—whether in one ship or in more. That would have been beyond doubt, if, in speaking of the mode of payment, *the contract had not said that the residue was to be paid for by

*161] acceptance at three months from the date of *the bill of lading*,—and, further, that should *the vessel* not arrive in time for the meal to be shipped by the 30th of June then next, or the sellers not be able to provide a *ship* by that date, then the sellers should be at liberty to draw for the remainder as specified above. That is, if the buyers do not send a ship in time, or the sellers cannot engage ship-room at St. Petersburg, the latter were to draw for the balance, although the meal should not have been shipped. There is no agreement, in terms, that the plaintiffs shall send out a vessel. The use of the words “the vessel,” and “the bill of lading,” may be considered reasonably to show that the parties

contemplated that the plaintiff would send out one ship only to receive the quantity mentioned in each contract. That being the probable state of things they *contemplated* (but did not *stipulate* for), they in terms provide for that mode of performance. It seems to me, however, that we should be giving an undue degree of narrowness to the construction of a contract of this sort, if we were to hold the buyers bound to adopt that mode of performance as a condition precedent to their right to maintain an action against the sellers for a breach of the contract on their part. The true construction seems to me to be this,—the parties, contemplating a certain mode of performing the contract, have pointed out how the payment is to be made in that event; but they leave the mode of payment, in case of performance of the contract in any other way, unprovided for, except so far as an analogy may be drawn from that which is provided. The substance of the contract is, that the one party shall deliver certain meal, and the other shall pay for it. Contracts of this sort would be expanded to a most unreasonable and inconvenient length, if they affected to provide specifically *for every possible contingency, and for every possible mode of performance. The practice [*162 is,—and it might be illustrated by some cases that have lately been before this court,(a)—to point out precisely what is to be done on the one side, and then to stipulate or provide for the most probable mode of performance on the other; leaving other ways of performing the contract unprovided for, and to be settled as the case might happen. In all probability the parties here did not anticipate any dispute or difficulty as to the mode of payment. If the construction I suggest be the true one,—and I have no doubt it is,—the circumstance of a single ship not having been sent to receive the meal which was the subject-matter of each contract, does not show that there has been a failure of performance of anything that ought to have been performed by the plaintiffs: there is, therefore, no inconsistency in saying that the plaintiffs have performed the contract in all things on their part, although they sent three ships, no one of which was of capacity sufficient to take on board the entire subject-matter of each contract. I therefore think that the verdict on these two issues was properly entered for the plaintiffs.

CRESSWELL, J. I am entirely of the same opinion. With respect to the first action, of *Meniaeff v. Reade*, there was no evidence of any agreement, before performance of any part of the contracts, that the two should be treated and considered as one. I therefore think the nonsuit was right.

As to the second action,—there was no express bargain between the parties that one ship, and one ship only, should be sent to Cronstadt, to receive the quantity of meal comprised in each contract. The whole *argument arises from the use of the words “ship” and [*163

(a) See *Cockburn v. Alexander*, 6 Mann. Gr. & S. 791

"bill of landing," in the singular number. We may infer, that, at the time of entering into the contracts, the parties contemplated that one ship only should receive such lot; but not that the plaintiffs contracted, as a condition precedent, that this should be done. I think there was abundant evidence that the plaintiffs were ready and willing to perform the contracts in all that they were bound to perform.

V. WILLIAMS, J. I am of the same opinion. In the first action, the lawsuit was clearly right. As to the second, the defendants had not courage to plead directly that the plaintiffs sent three ships instead of two; but they plead, amongst other things, that the plaintiffs were not ready and willing to buy and accept and pay for the remainder of the meal,—and that the plaintiffs have not performed their contract and promise in all things on their part to be performed. It appears to me that the plaintiffs *were* ready and willing, and that they did in substance perform the contract in all respects; and therefore that they are entitled to the verdict upon those two issues.

WILDE, C. J. It is very satisfactory to find that the legal construction of the contracts, is in accordance with that which the parties themselves had put upon them. I concur with the rest of the court in thinking that the conclusion arrived at in each case, was correct.

Rules refused.

*164] *HOARE, a Pauper, v. DICKSON. Jan. 27.

Where the plaintiff in an action of slander had been nonsuited *upon the merits*, and afterwards brought a second action against the defendant substantially for the same supposed cause of action, though slightly varying the words charged to have been spoken,—the court stayed the proceedings in the second action, until the costs of the first should have been paid.

In the year 1838, the plaintiff, who represented herself to be the daughter of a naval officer, became an applicant to The Royal Naval Benevolent Society, for pecuniary relief, which she received upon several occasions, down to the year 1844. The defendant, Captain Dickson, was secretary to the society, and, upon his reporting to them the result of inquiries he had made into the character and circumstances of the plaintiff, a resolution was come to, declaring her to be undeserving of further relief. At the instance of the plaintiff, a special committee was appointed to inquire into her claims upon the society; and the result was, that that committee, through their chairman, Captain Dickinson, reported to the society that she was not a fit object for relief.

In the year 1847, the plaintiff commenced an action against the defendant, for alleged slander, the declaration in which contained eight counts. The words charged in the first count were, "I have received letters from her brother, saying she is a wicked and abandoned woman,"—in the second, "she is an improper character, an impostor, and swindler,"—in

the third, "you are an impostor,"—in the fourth, "she has caused a report of her death to be circulated, and has procured a subscription for her supposed funeral," in the fifth, "she pretended herself to be dead, and caused a bill to be made out for her supposed funeral expenses, which bill I paid to a party whom (*sic*) I ultimately discovered had handed the money over to her,"—in the sixth, "she is an abandoned and wicked creature." The seventh count stated, that, before and *at the time of the committing of the grievance by the defendant as thereafter next [165 mentioned, a certain benevolent society, to wit, The Royal Naval Benevolent Society, had been and was established, for the relief of the distressed widows and children of deceased naval officers; and that the plaintiff, before and at the time of the committing of the grievances by the defendant as thereafter next mentioned, was a recipient of pecuniary relief from the said society; yet that the defendant, well knowing the premises, but further contriving to injure the plaintiff, afterwards, to wit, on, &c., in a certain other discourse which the defendant then had of and concerning the plaintiff, and of and concerning the said society, and of and concerning the plaintiff as such recipient of relief as aforesaid, in the presence and hearing of divers other good and worthy subjects of this realm, in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning the said society, and of and concerning the plaintiff as such recipient as aforesaid, these other false, scandalous, malicious, and defamatory words following, that is to say, "she (meaning the plaintiff) keeps an elegantly furnished bawdy-house, and, when she (meaning the plaintiff) either wants money, or for her (meaning the plaintiff's) reputation's sake, she (meaning the plaintiff) goes into lodgings, and applies to the society (meaning the said Royal Naval Benevolent Society) for relief." In the eighth count, the words charged were, "She is an unprincipled person, and her character is so bad that she can get no situation." The declaration then alleged for special damage, that, "by means of which said several premises, the said benevolent society, to wit, The Royal Naval Benevolent Society, wholly refused to make to the plaintiff divers charitable gifts which they might, *and otherwise [166 would, have done, and which the plaintiff during all the time aforesaid was, and continued to be, greatly in need of; and also, by means of the premises, the Rev. W. V. wholly refused to employ the plaintiff, which he might and otherwise would have done, for profit and reward to the plaintiff in that behalf, or to have any dealings, transactions, acquaintance, or discourse with her, and thereby the plaintiff lost, and was prevented from acquiring, divers great gains and profits which she might and otherwise would have thereby acquired; and also, by means of the premises, one Mrs. W., whose christian name was unknown to the plaintiff, with whom the plaintiff had theretofore lodged, wholly refused any longer to lodge the plaintiff, and forced and compelled her to leave, and

cease to lodge in, the house of the said Mrs. W.; and the plaintiff was and is, by means of the premises, otherwise greatly injured, &c.

To this declaration, the defendant pleaded,—first, not guilty,—secondly, that the said Benevolent Society did not, by reason of the committing of the said supposed grievances by the defendant, or of any or either of them, refuse to make to the plaintiff the said charitable gifts, or any or either of them; nor did the said Rev. W. V. wholly refuse to employ the plaintiff, or to have any dealings, transactions, acquaintance, or discourse with her, nor did Mrs. W. refuse any longer to lodge the plaintiff, or force or compel her to leave, or cease to lodge in, the house of the said Mrs. W., in manner and form as in the declaration alleged,—thirdly, that the said several causes of action in the declaration mentioned did not, nor did any or either of them, accrue at any time within two years next before the commencement of this suit, &c. Upon which pleas issue was joined.

*167] The case came on for trial, at the summer assizes for *Surrey, in 1847, before PARKE, B. During the progress of the plaintiff's case, the jury (a special jury) expressed so strong an opinion,—in which the learned judge coincided,—that there was no ground for the action, that the plaintiff's counsel consented to be nonsuited.

The defendant's costs were afterwards taxed at 40*8*l. 10*s*.

On the 12th of January, 1848, the plaintiff commenced a second action of slander against the defendant, suing *in formâ pauperis*.

The declaration in the second action alleged, by way of inducement, “that the plaintiff, before and at the time of the committing by the defendant of the several grievances thereafter mentioned, was the orphan daughter of Nicholas Hoare, deceased, who in his lifetime had been a lieutenant in the Royal navy; that the plaintiff, before and at the time of the committing by the defendant of the said grievances, had been, was, and continued to be, poor and in distressed circumstances; that a certain benevolent society, called, to wit, The Royal Naval Benevolent Society, before the time of the committing by the defendant of the said grievances, or any of them, had been and then was, and continued established for the relief of distressed widows and children of deceased naval officers; that the plaintiff had theretofore, and before and at the said time, when, &c., been, and then was, a recipient of pecuniary relief from the funds of the said society; that the plaintiff, before and at the said time, when, &c., was an applicant for pecuniary relief to the said society; that the plaintiff, before and at the said time, when, &c., had been and was a person of good name, credit, and reputation, and deservedly enjoyed the respect, esteem, and good opinion of divers persons and all her neighbours and acquaintance to whom she was in any
*168] wise known, and *had always behaved and conducted herself in a moral, truthful, and virtuous manner, and had never been guilty, or, until the said time, when, &c., suspected, of immorality, fraud, im-

posture, or falsehood." The declaration then proceeded to allege that the defendant, well knowing the premises, but contriving and wickedly and maliciously intending to injure the plaintiff, and to bring her into public scandal, infamy, and disgrace with and amongst all her neighbours, friends, and acquaintance, &c., and to lose their countenance, hospitality, and friendship, which she had theretofore and then enjoyed, and to cause it to be suspected and believed by those neighbours and subjects that the plaintiff had been guilty of immorality, fraud, imposture, and falsehood, and to vex, harass, impoverish, and wholly to ruin the plaintiff, theretofore, to wit, on the 10th of July, 1845, in a certain discourse which the defendant then had of and concerning the plaintiff, and of and concerning the said society, and of and concerning the plaintiff as such recipient of pecuniary relief as aforesaid, and of and concerning the plaintiff as such applicant for pecuniary relief as aforesaid, and of and concerning the premises, in the presence and hearing of those persons, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning the said society, and of and concerning the plaintiff as such recipient of pecuniary relief as aforesaid, and of and concerning the plaintiff as such applicant for pecuniary relief as aforesaid, the false, scandalous, malicious, and defamatory words following, that is to say, &c. The words charged in the first count were, "she is an abandoned woman, a vitiated character, an impostor, unworthy of belief, and deserted by her friends,"—in the second, "she keeps an elegantly furnished bawdy-house, and, when *she either wants money, or for her reputation's sake, she goes [*169 into lodgings, and applies to the society for relief,"—in the third, "she has caused a report of her death to be circulated, and has procured a subscription for her supposed funeral,"—in the fourth, "she obtains money in an improper way," innuendo, by prostitution,—in the fifth, "she has been living in an improper family," innuendo, that she had lived with a family who kept a house of ill-fame,—in the sixth, "*Hoare* is her name, and that (meaning a whore) is her profession," alleging the words to have been spoken in the presence of one P. S., and with intent to injure the plaintiff in his estimation,—in the seventh, "she is an unprincipled and dangerous woman, and the greatest liar on the face of the earth,"—in the eighth, "she is an unprincipled person, and her character is so bad that she can get no situation, because that her character will not bear investigation,"—in the ninth, "I have seen a letter from her brother, and she is, in consequence of her wickedness, abandoned by her family,"—and in the tenth, "she is a person of vitiated character, an unprincipled woman; and she holds deistical opinions; and she is an adventurer, a thorough impostor; and her wickedness and extravagance are unbounded; and she has applied to every branch of her family, but in vain." The special damage alleged was, amongst other things, as

follows:—that, “by means of the premises, the plaintiff had been and was prevented and hindered from printing and publishing a certain religious work, written by the plaintiff, entitled ‘Fear Not, being a humble endeavour to simplify and impress the gracious promises of Divine aid to the believer, as conveyed by those two words, in numerous parts of Holy Scripture,’ and also a certain other religious work, in four volumes, written by the plaintiff, entitled ‘Thoughts on the Litany,’ which she might and otherwise would *have done, for profit and reward to the plaintiff in that behalf; and the plaintiff was and is thereby prevented from acquiring divers great gains and profits which she might, and otherwise would, have thereby acquired,” &c.

Shee, Serjt., in Michaelmas term last,—upon affidavits stating that both this and the previous action arose out of the plaintiff’s said applications to the Royal Naval Benevolent Society for relief; that the plaintiff had no meritorious cause of action against the defendant, but that she was only resorting to legal proceedings against him for the purpose of harassing and annoying him; that she had adopted a similar course of annoyance against Captain Dickinson, that no part of the costs of the former action had ever been paid by the plaintiff, but the whole of them remained due from the plaintiff to the defendant; that the alleged causes of action in this cause mentioned, each and every of them, if any such causes of action existed, accrued to the plaintiff before the commencement of the first action; and that the alleged causes of action in the first, second, third, eighth, and ninth counts of the declaration in this cause, were substantially the same causes of action for which the said former action was brought,—moved for a rule calling upon the defendant to show cause why all further proceedings in this cause should not be stayed, until the costs of the former action had been paid, on the ground that the proceeding was *veratious*. He referred to *Melchart v. Halsey*, 3 Wils. 149, 2 W. Black. 741. There, the plaintiffs brought an action upon the case in the King’s Bench against the defendants, upon a contract made between the plaintiffs and the testator of the defendants, for forage found and provided by the plaintiffs for the *British troops in Germany, in the last war, at the instance and request of the testator, to the amount of 10,000*l.*, which action was tried before Lord MANSFIELD, at the Sittings after Easter term, 1770, when his lordship being of opinion, upon the evidence then given, that the contract was made upon public faith and the credit of the government, and not upon the credit of the testator of the defendants, the plaintiffs were nonsuited. In Trinity term, the plaintiffs moved for a new trial, which was refused, the whole court being of opinion, upon Lord MANSFIELD’s report, that the contract was made upon the credit of the government, and not of the testator of the defendants. In Michaelmas term, 1771, the plaintiffs brought another action upon the case against the defendants, and declared upon the very same contract,

and also filed a bill in Chancery. Upon a motion to stay the proceedings in the second action, until the costs of the former action were paid, on the grounds—that the plaintiffs were foreigners, residing in Germany, out of the reach of the process of the courts here—and that the second action was *vexatious*,—Lord Chief Justice DE GREY said: “If the court can be warranted by law to make this rule absolute, they ought to do it: the rule in Lord Biron’s case, 1 Vent. 100, was made upon this ground, that the second action was alleged to be *vexatious*, and shows that the court would have interposed in *that* case, if, upon showing cause, it had been sufficiently made appear to the court that it was brought for *vexation*. By the case in Lord Raymond,^(a) it seems to me the court would *there* have interposed, if the plaintiff had been nonsuited upon the *merits* at the trial. The case of *Gravenor v. Cape*, Easter, 9 G. 3, C. B., was well considered by the late Lord Chief Justice WILMOT and the *court, and the rule was made absolute upon this ground, *viz.* that they were of opinion the second action was *vexatious*; there- [*172 fore, if this second action be *vexatious*, we are sufficiently warranted by law and precedent, to interpose and make this rule absolute. It appears to the court by affidavit, that the former action hath been fairly tried before Lord MANSFIELD, that the whole merits of the case were entered into and discussed at the trial, that his lordship was of opinion the contract was made upon public faith and the credit of government, and not upon the credit of the testator of the defendants; that, upon a motion for a new trial, the whole court of B. R. were of the same opinion, and refused to grant a new trial; that the costs of the nonsuit have been taxed at 48*l.* 10*s.*, which (though demanded) have not been paid to the defendants or their attorney, by the plaintiffs or their attorney, which by law ought to be paid; that the plaintiffs have delivered a declaration upon the very same contract, that they have not produced any affidavit to show the court that they have any new case to make upon this second action, nor indeed have they produced any affidavit at all; so that we must take it for granted that no new case can be made upon a second trial; but it must be determined by the jury upon the same evidence which has already been given at the former trial: I am, therefore, of opinion that the plaintiffs ought to be content with the judgment of B. R., and that the present action is *vexatious*, and upon *that* ground *only*, proceedings therein ought to stay until the plaintiffs pay the costs taxed upon the nonsuit. I would have it understood that I lay the matter of the plaintiffs being foreigners, quite out of the case, and think the rule ought to be made absolute for this reason *only*, *viz.* because the present action is *vexatious*.” GOULD, J., said: “I am entirely of the same opinion with my lord chief justice, that the court ought *to make this rule absolute. The old law points out *this* to the court as a duty: the [*173 statute of Marlebridge, 52 H. 3, c. 6. Lord Coke, in his comment

(a) *Bass v. Firmen*, 1 Ld. Raym. 697.

thereon (2 Inst. 112), says, there is no greater injustice "than when, under colour of justice, injury is done:" that *multi litigant in foro, non ut aliquid lucrentur, sed ut verent alios*, &c. Although the court will not oblige a foreigner to give security for costs, yet, where he has had the merits tried and determined against him, and will not do justice by paying the costs, he becomes *vexatious* by bringing a second action to try the same matter; and, *for that reason alone*, I think the rule ought to be absolute: I lay the circumstance of the plaintiffs' being foreigners, quite out of the case." And BLACKSTONE, J., said: "I lay plaintiffs being foreigners out of the case, and am exactly of the same opinion with my lord and my brother GOULD. I will say one thing for myself only,—that I think, in *all cases* where the merits have been tried, plaintiffs should not be permitted to commence a second action to try the same matter, before costs paid in the first: but this is not now before the court; *vexation* is now the single point we determine upon."

A rule nisi having been granted,

S. Carter now showed cause, upon affidavits by the plaintiff and her attorney, stating that the alleged causes of action in the first, fourth, fifth, sixth, seventh, ninth, and tenth counts of the declaration in this cause, were not the same, but were different to the causes of action for which the former action was brought; and that the costs of the former action had been fully paid or satisfied to the defendant or his attorneys, by the Royal Naval Benevolent Society, and that no part of the same *174] was due or owing to the defendant or his attorneys from the plaintiff. It may be conceded that the court has power to interfere summarily to prevent an abuse of its process: and there are cases where proceedings have been stayed until payment of costs of a former action between the same parties, founded upon the same subject-matter of complaint: *Weston v. Withers*, 2 T. R. 511; *Liversidge v. Goode*, 2 Dowl. P. C. 141; *Haigh v. Paris*, 16 Law Jour. N. S., Exch. 511. But, in those cases, as in *Melchart v. Halsey*, the plaintiff had clearly acted vexatiously. In *Harrington v. Johnson*, Cowp. 744, in a *qui tam* action, for insuring lottery tickets, contrary to the statute 16 G. 3, c. 34, the court refused to stay the proceedings, upon an affidavit of the defendant, that a former action had been brought against him in the Common Pleas for the *same offence*, in which he had leave to compound. So, in *Cooke v. Dobree*, 1 H. Black. 10, the court refused to stay proceedings against the defendant, until the debts and costs recovered by him in a former action against the plaintiff, were paid. In *Dawson v. Sampson*, 2 Chitt. Rep. 146, the defendant was arrested at the suit of the plaintiff, who becoming bankrupt, the proceedings were dropped, and the assignees having again arrested the defendant, the proceedings were set aside, the chancellor having superseded the commission; but, a fresh commission having issued, and another set of assignees being chosen, they arrested the defendant again, and were proceeding in the action. The court

refused to stay the proceedings, until the costs of the proceedings at the suit of the first set of assignees were paid. [MAULE, J. The parties there were not identical.] In *Doe d. Rees v. Thomas*, 2 B. & C. 622, 4 D. & R. 145, the court say that "the rule to stay proceedings until the costs of a former ejectment are paid, is not inflexible." [MAULE, J. *The circumstances of that case were very peculiar.] In *Beaven v. Robins*, 8 D. & R. 42, the plaintiff, being nonsuited, was taken in [*175 execution by the defendant for the costs, and, whilst in execution, brought another action for the same cause,—The court refused to stay further proceedings in the second, until the costs of the first action were paid. In *Dicas v. Jay*, 6 Bing. 519, 4 M. & P. 285, the plaintiff had sued the defendant for negligence, *per quod* the plaintiff became *liable to pay* certain sums, and lost the custom of A., B., and C. The cause was referred under an order of *nisi prius*, by which the plaintiff was precluded from bringing any new action. The arbitrator made an award in favour of the plaintiff, who, nevertheless, sued the defendant again, the new declaration differing from the old one, in stating that the plaintiff *had paid* the money he before alleged himself *liable to pay*, and had lost the custom of D., E., and F. This court refused to stay the proceedings in the second action. In *Yates v. The Dublin Steam-Packet Company*, 6 M. & W. 77, which was an action by the owners of goods which were on board a vessel, and were lost by a collision with the defendants' vessel, the jury having found a verdict for the defendants, the plaintiff in another action against the same defendants for the same injury, which stood next in the paper for trial, withdrew the record: and the court refused, on the application of the plaintiffs in the first action, to stay the judgment and execution until after the trial of the second, although it was stated, on affidavit, that material evidence in favour of the plaintiffs, which could not be produced on the former trial, would be adduced on the other;—the judge being satisfied with the verdict. And in *Wade v. Simeon*, 1 Man., Gr. & S. 610, an action by A. against B., to recover *the amount of two checks and interest, being at issue in the Exche- [*176 quer, and the trial appointed for the 7th of December, a negotiation took place between the attorneys on the 6th, when it was arranged, that the record should be withdrawn, and that B. should submit to a judge's order for payment of the amount claimed on the 14th, otherwise judgment, and that certain proceedings in Chancery taken by B. against A. should be withdrawn. An order was accordingly drawn up and served. B. subsequently discovering evidence which he conceived would enable him to substantiate his defence to the action, obtained a rule to set aside the judge's order, upon payment of costs. Those costs were taxed, and paid to A., who afterwards brought an action in this court against B., for breach of the agreement under which the judge's order was drawn up. The court, on motion, refused to stay the proceedings in the second action,—considering that it was not founded upon the *same cause of action*

as the first. TINDAL, C. J., in the course of the argument, observes: "We must not, on light grounds, deprive a plaintiff of his common law right of trying his action." [MAULE, J. Can you find any case where a second action has been allowed to proceed, after a decision *upon the merits* has been had and acquiesced in?] There was no decision upon the merits here. The plaintiff was nonsuited. [MAULE, J. Not upon a technical objection. Can you show that the second action is not *vexatious*?] The court will not assume that it *is* vexatious. The plaintiff may reasonably desire to rescue her character from the calumnious aspersions that have been cast upon it. The plaintiff's own affidavit shows, that, as to several of the counts at least, the cause of action is different.

Shee, Serjt., and *Lush*, who were to have supported the rule, were stopped by the court.

*177] *WILDE, C. J. The principle upon which this case must be decided, is, I believe, perfectly well recognised in all the courts. Where a party has brought an action, and has had an opportunity of trying that action upon the merits, and has either failed upon the merits, or has withdrawn his case, and afterwards brings a second action for the same cause, leaving the costs of the first action unpaid,—the court will interpose its authority to prevent him from so harassing his opponent. The facts appear to be these:—The defendant was the secretary of a charitable institution called The Royal Naval Benevolent Society. The plaintiff, who represents herself to be the daughter of a deceased naval officer, and as such a proper object of relief, had applied to the society for assistance. The defendant, whose duty it was to make inquiry as to the character and means of such applicants, in the course of such inquiry obtained information which induced the society to withhold from the plaintiff the relief she sought. The plaintiff thereupon brought an action of slander against the defendant, in respect of the representations so made by him in his character of secretary to the society. The cause went down to trial, and the plaintiff's case was heard at some length, and ultimately her counsel consented to a nonsuit,—not upon any technical ground, but on the merits, and from a conviction, from which it was impossible to escape, that the plaintiff could not establish her right to a verdict. In this defence, it appears, the defendant has incurred costs to the amount of 408*l.* 10*s.*, an amount sufficient to ruin many persons. The plaintiff has not paid these costs; but she has, nevertheless, commenced a second action against the defendant, which upon the face of the declaration evidently appears to be founded substantially upon the same supposed cause of action, and the object of which can only be to harass and

*178] annoy the defendant, *and to put him to further expense. It is said the causes of action in the two cases are not identically the same, and therefore that the court has no power to interfere. It is true that some of the counts in the new declaration charge the defendant with

having spoken words slightly differing from those charged in the former action. How easy it is in an action of this sort,—and especially where the plaintiff's object is such as is here suggested,—so to vary the words as to make that which is in reality the same, appear to be a new cause of action. We must, however, form a reasonable judgment, from the whole of the surrounding circumstances, whether the difference is substantial or merely colourable. No facts are laid before us, on the part of the plaintiff, to induce us to believe that she has any cause of action that did not exist at the time of the former declaration. And, on the other hand, we have the defendant's affidavit, which states that all the words alleged to have been spoken by him, if spoken at all, were spoken before the commencement of the first action. If, therefore, any part of the slander charged in the second declaration does differ from that charge in the first, there is no reason why it should not have formed part of the declaration in the first action. It appears to me that this action is substantially brought for the same cause as the former; and that the defendant, who has already been subjected to so large an outlay for costs, ought not to be further harassed,—particularly by an opponent, who, suing *in formâ pauperis*, herself incurs no expense.

It is said that the costs of the former action have been paid by the Royal Naval Benevolent Society. Suppose they have; that is not a payment made on behalf of the plaintiff, but merely to relieve an officer who has incurred them in the course of the due discharge of the duties of his office as secretary. As *between the plaintiff and the defendant, [*179 the costs have not been paid.

The rest of the court concurring,

Rule absolute.(a)

(a) Upon a similar application made in a second action of slander brought by the same plaintiff against Captain Dickinson, for words alleged to have been spoken by him under the same circumstances as are stated above, a similar rule was pronounced.

TURQUAND and Others, Assignees of PETER CLAUSSEN, a Bankrupt, v. HENNETT. Jan. 30.

Upon a demand of oyer of a deed *prolat. in curiam* by the plaintiffs, their attorney delivered to the defendant's attorney a copy of the deed, with erasures and alterations in red ink, as they appeared on the face of the deed, although such alterations had been made without authority. The defendant thereupon set out the deed in his plea, as altered:—The court refused to set aside the plea, but allowed the plaintiff to redeliver oyer, in such form as he might be advised, on payment of costs.

THIS was an action of debt upon an indenture.

Before the delivery of the declaration, the defendant's attorneys applied to the plaintiffs' attorneys for a copy of the indenture, and the latter accordingly delivered to the former a copy *with alterations in red ink* (precisely as they appeared in the original deed), which alterations were alleged by the defendant's attorneys, to have been made in the indenture after its execution by his client. This the plaintiffs' attorneys

admitted; but they insisted, that, as these alterations had been made without the knowledge of the bankrupt, the plaintiffs were not bound or prejudiced thereby, but were entitled to treat the indenture as if it had not been altered.

The declaration was delivered on the 18th of April last. On the *180] 20th of May, the defendant demanded oyer and a copy of the indenture, when it was agreed between the respective attorneys that the copy so as aforesaid delivered, should be considered as delivered pursuant to the demand of oyer. The defendant pleaded on the 5th of June, setting forth the indenture, not in the words in which it stood when executed, but as it read with the alterations. The plaintiffs' attorneys thereupon wrote to the defendant's attorneys, as follows:—

“We beg to give you notice, that, in setting out in the pleas the indenture between the bankrupt and the defendant and others, you have, as we are advised by counsel, set it out incorrectly. If you have done so in consequence of the copy delivered to you showing the red ink alterations which so appear upon the deed, we beg to inform you that the true copy is in the original black ink, and that you are at liberty to rectify the pleas accordingly; the parts in red ink having been given to you to show the true state of the paper. We, therefore, now apply to you to alter the oyer; and, unless you do so, we shall treat the pleas as setting out the deed falsely.”

To this, the defendant's attorneys replied that they had conferred with counsel on the subject, and were advised, that, having set out the indenture in the pleas as delivered on demand of oyer, no alteration ought to be assented to by them.

Bramwell, for the plaintiffs, on the 22d of November last, moved for a rule calling upon the defendant to show cause why this plea should not be set aside, or why the setting out of the deed on oyer should not be amended, with costs. It clearly cannot be right to set out the deed as altered. [COLTMAN, J.—If the defendant has not properly set out the deed on oyer, is not the proper course for the plaintiffs to pray that the deed may be enrolled, and then set it out truly?] In 1 Wms. *181] *Saund. 9 c, 6th edition, it is said: “If the defendant, after craving oyer of a deed, do not set forth the whole deed, or misrecite it, the plaintiff may either sign judgment as for want of a plea,—Wallace v. The Duchess of Cumberland, 4 T. R. 370,(a)—or he may, by his replication, pray that the deed may be enrolled, and procure it to be truly enrolled, and demur: Com. Dig. *Pleader* (P. 1.) See *Ferguson v. Mackreth*, 4 T. R. 370, n.(b). For, by craving oyer, the defendant undertakes to set out the whole; the distinction being, that, where a party, having craved oyer of a deed or other instrument, does upon such oyer misrecite it, the other side may relieve himself, by praying that the deed, &c., may be enrolled in hæc

(a) But see 3 M. & R. 86, n.

verba; but, where a person who is bound to set out a deed or other instrument (as, in the case of a bond conditioned for performance of covenants contained in an indenture), sets it out with a profert, and misrecites it, the other side may relieve himself *by praying oyer* of the deed or other instrument, and *setting it out in hæc verba*: *Ferguson v. Mackreth*; *Stibbs v. Clough*, 1 Stra. 227." Referring to Comyns's Digest, it will be found that this rests upon the following passage,—for which no authority is cited,—“If the defendant demands oyer of a deed, which is granted, and in his plea recites the deed different from the true deed, the plaintiff, by his replication, may pray that the deed may be enrolled, and so procure it to be truly enrolled.” [MAULE, J. Lord Chief Baron Comyns is generally esteemed no mean authority. The matter was recently discussed here in the case of *Kepp v. Wiggett*, 6 Man. Gr. & S. 280.] It is difficult to see how the statement in Comyns can be correct. Upon a demand of oyer, the deed is supposed to be read in court by the officer. How, in reading it, is the officer to convey a notion of an erasure by drawing a pen through a part, or of an insertion in red ink? [MAULE, J. In the same page of Comyns to which you [*182 refer, it is said: “If a man craves oyer of a deed shown in a declaration which is granted, the other cannot say that the deed read is not the same on which he declared; for the reading is the act of the party himself, by which he is concluded.(a) If a party undertake to set out a deed on oyer, he must set forth the whole of it, recital and all; if he omit any part, either the court will quash the plea, or the other side may sign judgment.(b) Where there is any variance between the letters of administration set forth in the declaration, and the letters, &c., actually granted under the seal of the spiritual court; if the defendant will take advantage thereof, he must crave oyer thereof before the rule to plead, is out, must set the same out on record, and demur for the variance.(c) Otherwise, if oyer is demanded of a writ, &c., he may say that it is not the same; for the reading is the act of the court. *Per* three justices,(d) *TRACY, contra*.”(a) [V. WILLIAMS, J. It was stated in argument in *Newton v. Wilmot*, 8 M. & W. 720, that, “in the case of an omission to set out the whole of the deed upon oyer, the plaintiff may pray that the deed may be enrolled, and may then demur generally for the variance between the deed as enrolled, and the deed as appearing upon oyer:” and nobody seems to have doubted it. CRESSWELL, J. The plea appears to have been quashed in *Wallace v. The Duchess of Cumberland*, vide 3 M. & R. 86, n.] In that case, as well as in *Ferguson v. Mackreth*, the decision proceeded upon the *ground that the defendant had been guilty [*183 of misconduct; and therefore they are not, perhaps, very much

(a) *Simpson v. Garside*, Lutw. 1844.

(b) This position,—for which *Wallace v. The Duchess of Cumberland*, 4 T. R. 371, is cited,—is an addition made by a late editor to the text of Lord C. B. Comyns.

(c) Also an addition, for which *Garrard v. Early*, 2 Wils. 413, is cited.

(d) *Trevor, C. J.*, and *Nexil and Blencow, JJ.* *Vide post*, 183.

to the purpose. If we adopt the course suggested,—that of praying enrolment,—the defendant will come to the court to have our enrolment set aside; and so the question must ultimately be disposed of on motion.

A rule nisi having been granted,

Hindmarch and *Hugh Hill* now showed cause. This is not a case in which the defendant has falsely set out the deed on oyer. He has, in fact, set it out correctly, according to the copy furnished by the plaintiffs themselves. He has set out all that the officer of the court is supposed to have read to him. He was bound to set it out in its altered form. The granting of oyer is the act of the plaintiffs themselves. In *Simpson v. Garside*, in debt on bond, the defendant prayed oyer of the original writ, which was set out, bearing teste the 16th of April, 2 Ann.; whereupon the defendant pleaded, that by the writ and declaration it appeared that the original was sued out before the date of the bond; to this the plaintiff replied, that the writ upon which he declared, was another writ, bearing teste the 7th of May, 2 Ann.: and, upon demurrer “Fuit tenus per le Ch. Justice TREVOR, NEVIL and BLENCOW, justices que le replicat’ en ceo case fuit bone; car, le brief esteant file, le lyer de ceo est le act et office del court; et ceo ne prejudicera le pl., ne luy conclude a monstre le voyer brief: et ceo n’est semble al oyer d’un fait; car, le lyer de ceo est le act de pl. mesme; et pur ceo il ne serra admit adire que le fait issint lye al def. n’est le fait sur que il ad court.”(a)

*184] When the deed is read by the *officer, it must be read as it stands: that which is erased forms no part of the deed. Besides, how is the court to try upon affidavit whether certain portions which are struck out do or do not form part of the defendant’s deed? [WILDE, C. J. How can we decide whether the alterations were made before or after the execution of the deed by the defendant? If the plaintiffs choose to deliver the deed without the alteration, the defendant will know how to deal with it.] *Longmore v. Rogers*, Willes, 288, Barnes, 263 shows that the defendant was entitled to a strict and perfect copy of the instrument, on oyer. [WILDE, C. J. *Wallace v. The Duchess of Cumberland*, and *Ferguson v. Mackreth*, though not authorities exactly in point, show how strictly a defendant is bound by the copy delivered to him.]

Bramwell, in support of his rule. The case of *Waugh v. Bussell*, 1

(a) “Mes Justice Tracy fuit d’auter opinion; car, quand le def. pria oyer del brief, et ceo est lye a lui,—come le brief en cest action, ceo est le act del court; et quand ceo est enter sur le record, le pl. ne serra admit adire que ceo n’est le voyer brief en cest action, et issint faulxifie l’act del court. Mes si le brief ust estre misprise, l’attorney pur le pl. sur le delivery del paper-book a luy, duisoit aver ceo rectifie, ou puissoit aver apply al court a ceo rectifier. Mes quand il n’ad ceo fait, mais ad ceo allow et permit ceo d’estre enter sur record in hæc verba, il serra conclude apres adire que ceo ne fuit le voyre brief.”

And the reporter adds this—“Nota, que un ne poit demand oyer d’un fait mes durant le temps que ceo est en court, et ceo est per tout le terme en que ceo fuit produce en court: *Wimark’s case*, 5 Co. Rep. 74: issint que est autant en le poyar de court a doner oyer d’un fait, come d’une brief. Quere, donc, le reason del difference enter oyer de brief et oyer de fait.” A deed brought into court, remains in the hands of the bringer; a writ is in the custody of the court.

Marsh, 214, shows that the plaintiffs must fail, if they were to go down to trial upon the record as it now stands,—assuming, of course, that the alterations in the deed took place after its execution by the defendant. There, to an action of debt on bond, the defendant prayed oyer of the condition, which was, “for the payment of 100*l.* by instalments, till the said *sum of 100*l.* be paid;” and then pleaded *non est factum*: [*185 the word “hundred” had been omitted in the second place where it occurred in the condition, and was afterwards inserted without the defendant’s knowledge: and it was held, that, though this alteration did not avoid the instrument, yet it made such a variance between the oyer and the condition, as precluded the plaintiff from recovering. “When you declare on a deed,” says GIBBS, C. J., “you state the legal effect of it; and, as I said before, one might declare without using a word which is contained in the deed, except the names of the parties, and the sum. The defendant, by his plea, asks to look at the instrument by which the plaintiff alleges that he is bound. It is necessary, then, not merely to show the legal effect, but the very words by which the defendant is bound; and that makes the distinction between the case where the oyer and declaration disagree, and where the statement in the oyer is not supported by the deed itself. You can cite no case where it has been held that a variance between the deed and the oyer is not fatal; the court, therefore, cannot assist you. You had your remedy in your own hands; for you might have explained the mistake by averments.” [WILDE, C. J. It occurs to me that the proper course would be, to allow the plaintiffs to amend the copy delivered by them, as they may be advised.] The defendant here clearly has not adopted the proper course. The doctrine of oyer is thus stated by Mr. Serjeant Stephen: (a) “When the profert was actually made *in open court*, the demand of oyer, and the oyer given upon it, took place in the same manner; and the course was, that, on demand by one of the pleaders, the deed was read aloud by the pleader on the other side. (b) By the present practice, the attorney for the *party by whom it is demanded, before he answers the pleading [*186 in which the profert is made, sends a note to the attorney on the other side, containing a demand of oyer; on which the latter is bound to carry to him the deed, (c) and deliver to him a copy of it, if required, at the expense of the party demanding; and this is considered as oyer, or an actual reading of the deed in court.” (d)

WILDE, C. J. It appears to the court that the circumstances attend-

(a) Stephen on Pleading, 5th edit. 73.

(b) Citing with a *semble*, Com. Dig. *Pleader* (P. 1); *Simpson v. Garside*, Lutw. 1644. To which the learned serjeant adds: “In *Jevons v. Harridge*, 1 Sid. 308, the reading of the deed is said to be the act of the court: but the true doctrine is probably that laid down in *Lutwyche*. The rule seems to have been that *writs* were read by the court, but *deeds* by the pleader.

(c) Citing the *Archbishop of Canterbury v. Tubb*, 3 N. C. 789, 4 Scott, 543.

(d) Citing *Page v. Divine*, 2 T. R. 40; 1 *Tidd’s Practice*, 8th edit. 635; 1 *Selw.* 264; *The Archbishop of Canterbury v. Tubb*, *ubi supra*; *Daly v. Mahon*, 4 N. C. 235, 5 Scott, 606; *Smith v. Goldsworthy*, 1 Dowl. N. S. 288.

ing the delivery of the copy of the deed in this case, were such that the plaintiffs ought to be at liberty to amend it, on payment of costs; the costs of this motion to be costs in the cause; with liberty to the defendant to plead *de novo*.

The rule was drawn up as follows:—"That the oyer and the defendant's pleas respectively be set aside, and that the plaintiffs be at liberty to re-deliver oyer as they may be advised, the defendant also being at liberty to plead *de novo*; that the plaintiffs pay to the defendant all such costs and charges as shall be occasioned or lost to the defendant by the said oyer and pleas being set aside as aforesaid, to be taxed, &c., and paid immediately after the defendant shall have so pleaded *de novo*, or immediately after the sooner discontinuance or other determination of the cause; and that the costs of and occasioned by this application abide the event of the cause."(a)

(a) See *Loveland v. Knight*, 3 C. & P. 106; *Paine v. Emery*, 2 C. M. & R. 304, 5 Tyrwh. 1097, 4 Dowl. P. C. 191; *Ashton v. Freestun*, 2 M. & G. 1, 2 Scott, N. R. 273.

Sir GODFREY WEBSTER, Bart., and Dame CHARLOTTE WEBSTER, v. DELAFIELD. Jan. 31.

Upon an application for a rule or order under the interpleader act, an affidavit by the claimant himself, in support of his claim, is not indispensable. And *semble*, per MAULE, J., that no affidavit at all is necessary.

The sheriff having seized goods under a *fi. fa.*, a claim was made on behalf of A., who was resident in Paris. Upon an interpleader summons, A.'s attorney made an affidavit, that he had been informed, and, from documents, vouchers, and receipts in his possession, believed, that the goods seized were the *bona fide* property of A.:—Held,—V. WILLIAMS, J., *dissentiente*,—that this was a sufficient maintaining of the claim, to justify the judge (or the court, on the judge's refusal) in directing an issue.

And it was made part of the rule, that the claimant should give security for costs.

THE sheriff having, on the 4th instant, seized, under a writ of *fi. fa.* issued upon a judgment obtained by the plaintiffs against the defendant, certain furniture and effects upon the premises known as Willow-Bank Fulham, in the county of Middlesex, a notice of claim was, on the 7th instant, served upon him by the solicitors of one Henry Arthur Webster. The sheriff thereupon made application to a judge at chambers, for protection, under the interpleader act, 1 & 2 W. 4, c. 58, s. 6.

Accordingly, at the return of the summons, the parties attended before COLTMAN, J., on the 10th, when the solicitor of the claimant produced an affidavit, in which he (the claimant) stated that "he is the absolute
*188] owner and proprietor of the mansion-house, &c., called Willow-Bank, at Fulham, and that all the goods, chattels, properties, and effects in and upon the said mansion-house, &c., and now seized and held by the sheriff of Middlesex under and by virtue of a writ of *fi. fa.* issued in this action, are the absolute property of this deponent, and by him

were left in the care and custody of his housekeeper and servants at Willow Bank, Fulham, aforesaid, when he, this deponent, left England for the continent, in the autumn of last year."

On the part of the execution-creditor, it was objected that this affidavit was not sworn before a competent authority, it having been sworn before the British consul at Paris. The learned judge thereupon adjourned the hearing until the next day.

The parties again attended on the 12th, when an affidavit of Mr. Rickards, the claimant's solicitor, was produced, which stated, that, to the best of the deponent's knowledge, information, and belief, the goods, chattels, and effects levied in this action, were the property of the said Henry Arthur Webster, and not of the defendant; that the title-deeds of the mansion-house, buildings, and premises, in and about which the goods were, were in the deponent's possession; that the same mansion-house and premises were conveyed to the said Henry Arthur Webster in the year 1847, by one General Conyers, with whom the said Henry Arthur Webster had nearly two years previously contracted for the purchase, and were still his property; that, from the nature of the property, a sale by the sheriff would be most injurious; that Henry Arthur Webster left England for the continent, in the autumn of the last year; and that the said mansion-house, furniture, and effects were then left in the possession, care, and custody of the housekeeper and servants of the said Henry Arthur Webster.

Not being satisfied with this affidavit, the learned *judge again adjourned the hearing until the 19th, when a second affidavit of [*189 Mr. Rickards was produced, stating that he was the attorney of Henry Arthur Webster; that he claimed the said goods, as such attorney, on behalf of the said Henry Arthur Webster; that, from various documents, vouchers, receipts to invoices, and papers belonging to the said Henry Arthur Webster, in the possession of the deponent, he, the deponent, verily believed that the goods so seized by the said sheriff were the *bona fide* property of the said claimant, Henry Arthur Webster; that he had made great exertion to obtain a further affidavit from the claimant, but without effect; that he had employed one Smith, an attorney of this court, residing in Paris, to procure from the said Henry Arthur Webster an affidavit duly sworn, but that, for the reasons set forth in a letter which he had received from Smith,—the substance of which was, that though formerly it had been the practice to swear affidavits in suits pending in our courts before the Juges de Paix, about fifteen years since the then minister of justice had issued a circular to those functionaries, prohibiting them from administering oaths in the case of foreign affidavits, and that the only course was, to send a "*commission rogatoire*" from the court here to the "*Tribunal de Première Instance*" of the department of the Seine, to administer the oath,—the deponent verily believed that it was impracticable to obtain such affidavit, and that he

had been informed, and believed, that the said Henry Arthur Webster was in such a state of health as not to be able to travel with safety.

The learned judge, after hearing all the parties, made the following order:—

“Upon hearing the attorneys or agents for the plaintiffs, for Arthur Webster, the claimant, and for the sheriff of Middlesex, and upon reading the affidavits *of E. H. Rickards, of John Baker, of Henry Arthur *190] Webster, and the further affidavit of E. H. Rickards, I do order that the said claimant be barred his claim herein; and that the said sheriff do not proceed to a sale for two days.”

M. Smith, on the 20th, moved for a rule nisi to rescind the above order, or for a commission to take the affidavit of the claimant at Paris. He submitted that it was not absolutely essential that the claimant himself should make an affidavit. [MAULE, J. The statute does not say that the claimant shall make an affidavit. It has been the practice to do so: but I do not see what authority there is for requiring it, or what power the judge has to bar the claimant merely because he makes no affidavit. WILDE, C. J. Where a party is required to state something in the course of a judicial proceeding, I think it must be understood that the matter shall be authenticated by an oath.] The question is, whether the oath of the claimant himself is indispensable. [CRESSWELL, J. It seems to have been so held in *Powell v. Lock*, 3 Ad. & E. 315.]

WILDE, C. J. I think there should be a rule nisi. Whether or not an affidavit by the claimant himself is absolutely necessary, I will not at present say. But I think *some* affidavit, at all events, there must be. Throwing aside Webster's affidavit, it certainly does appear to me that those of Mr. Rickards amount to nothing. I must confess I do not see any good reason why an affidavit upon a matter of this kind should not be sworn before the British consul, as well as in the case of acknowledgments taken under the 3 & 4 W. 4, c. 74.

*191] *MAULE, J. I think the execution-creditor has a right to the production of proper materials to enable him to form a correct judgment as to the nature of the claim.

Bramwell now showed cause. The questions for consideration upon this rule, are two,—first, whether any affidavit at all is necessary upon an interpleader summons,—secondly, whether the affidavits that were produced before the learned judge upon this occasion, were sufficient to justify him in directing an issue. By the first section of the act, the party making a claim is to be called upon to appear before the court or the judge, and to state the nature and particulars of his claim, and to maintain or relinquish the same. It is important that the claim should be made in an authentic shape; and, unless that be so, there would be no such record of the proceedings as the legislature (by s. 7) seem to have thought necessary. In *Powell v. Lock*, the court of Queen's Bench held an affidavit, and an affidavit of the claimant himself, to be neces-

sary. LITTLEDALE, J., says: "The act requires *the party* to appear and state the nature and particulars of his claim. Must not that be on affidavit? Can we take it on the statement of counsel?" [MAULE, J. The party is dragged before the judge. It does seem to me a most monstrous thing, to say that his claim, which he has a *right* to have tried by a jury, should be disposed of by the judge, upon *his own* affidavit.] The claim is his own voluntary act. [MAULE, J. He loses his goods if he abstains from claiming.] Will any statement by any person suffice? [MAULE, J. I should think so. By the 3d section, it is enacted, that, "if such third party (that is, the claimant) shall not appear upon such rule or order, to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the *court or judge to declare such third party, and all [*192 persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators," &c. And s. 1 enacts that "it shall be lawful for the court, or any judge thereof, to make rules and orders, calling upon such third party to appear, and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the mean time to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue, or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or, *with the consent of the plaintiffs and such third party*, their counsel or attorneys, to dispose of the merits of their claims, and determine the same in a summary manner, and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable." Power to bar the claim, if given at all, should be given in express terms. It is one thing to call on ~~the~~ party to state the nature and particulars of his claim; to *maintain* it, is another.]

Unless the court see clearly, that, in the conclusion he came to, the judge was wrong in point of law, or mistaken in his view of the facts, his decision will not be interfered with. Where the matter is one that is entirely for his discretion, to decide upon the materials that are laid before him, the court must have very strong and convincing reasons before they will disturb the judge's order. The affidavits that were before the judge in this case, are not such as would have sufficed to induce any one of the court to grant an issue, if the matter were now brought before him for the first time. *[MAULE, J. The third party is to "main- [*193 tain his claim." He is not to *prove* it; but to state the nature and particulars of it. Is the judge to try the claim by a sort of demurrer?] The judge must have reasonable proof that the claim is well founded; otherwise, the going before him is a mere farce.

M. Smith, in support of his rule. By the 1st and 6th sections, the

judge is empowered to call the parties before him. If, upon being served with the rule or summons, the claimant "shall not appear upon such rule or order, to maintain or relinquish his claim," or "shall neglect or refuse to comply with any rule or order to be made after appearance," then it shall be lawful for the court or the judge to declare the claimant barred. Here, the claimant has properly appeared by attorney; and he has not neglected or refused to comply with any rule or order made after appearance. [MAULE, J. That means disobedience of either of the three principal orders the court (or judge) is authorized by s. 1 to make, viz. the order to appear and state the nature of the claim, the order directing an issue, and the order for disposing of the merits by consent: the other orders spoken of are orders incidental to these three.] This order, then, does not, upon the face of it,—as it should do; *Harrison v. Wright*, 13 M. & W. 816, 2 D. & L. 695,—show that the learned judge had jurisdiction: it does not show that the claimant did not appear to maintain his claim, or that any order was made which he has disobeyed. [CRESSWELL, J. It does not appear whether my brother COLTMAN refused to pay any attention to Mr. Rickard's affidavit, or whether he thought it insufficient.] It does not. But, at all events, it is submitted,—assuming *194] that the judge rightly rejected *Webster's affidavit, (a)—the nature and particulars of the claim are sufficiently stated in the other affidavits. It was not the province of the judge to try the *validity* of the claim. [MAULE, J. The party may have a very good claim, and yet may be unable himself to make a positive affidavit.]

Burchell appeared on the part of the sheriff. He submitted that the court ought not simply to rescind the order, as prayed by the rule, for, that would prejudice the sheriff. [MAULE, J. You wish us to do what the judge ought to have done, that is, to direct an issue. *M. Smith* expressed his readiness, on the part of the claimant, to accept an issue.]

WILDE, C. J. Upon the best consideration I am able to give to this case, I think the order of my brother COLTMAN should be set aside. I found my opinion upon, and am desirous to limit it to, the facts of the particular case. It appears that the claimant is a gentleman residing in a foreign country, where there are no means at present available for making a proper affidavit. He appears, therefore, before the judge to support his claim, by attorney, who proposes to put in a statement of the claim by his client, which the learned judge declines to receive because not duly authenticated. In the absence of the claimant himself, the only person who can give any information upon the subject, is the attorney; and he accordingly states upon his oath, that, from documents that are *195] in his possession, he verily believes the goods seized to be the property of his client. It may well be, considering *that the party could not make his claim personally, that the utmost information that

(a) It is somewhat singular that the order is drawn up on reading this rejected affidavit, amongst others. The rule is, of course, drawn up according to the order.

could be given is founded upon the attorney's belief arising from an examination of the documents in his possession. Looking, therefore, at all the circumstances of the case, I think the affidavits which were used before the learned judge, should have been deemed sufficient to entitle the claimant to an issue. I therefore think the rule should be made absolute to set aside the order; and that it should be part of the rule, that the parties proceed to the trial of an issue, in which the claimant shall be plaintiff and the execution-creditors defendants, with all the other usual terms.

MAULE, J. I am of the same opinion. The statute nowhere says that the claim shall be made by *affidavit*. But, at all events, assuming an affidavit to be necessary, the affidavit here produced, was, I conceive, sufficient. This was an application made on behalf of the sheriff, under s. 6: but I do not think the power of the judge to bar the claimant, differs in the case of the sheriff from that of any other person. The 1st section of the statute enacts, that, upon application made by or on the behalf of any defendant,—such application being made after declaration, and before plea, “by affidavit or otherwise,” showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court or to pay or dispose of the subject-matter of the action in such manner as the court (or any judge thereof) may order or direct,—it shall be lawful for the court, or any judge thereof, to make rules and orders, calling upon such third party *to appear and to state [*196 the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or, *with the consent of the plaintiff and such third party*, their counsel or attorneys, to dispose of the merits of their claims, and determine the same in a summary manner, and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable. The true construction of that clause appears to me to be this: The court or judge is to make an order upon the claimant to appear and state the nature and particulars of his claim. This, it seems to have been held,—though I think that doubtful,—must be by affidavit. He is also to maintain or relinquish his claim. If he fails to appear, or, appearing, relinquishes his claim, he is, by s. 3, to be barred. If the claimant appears and maintains his claim, he is to be made defendant, or the judge is to direct an issue, or, with the consent of the parties, to dispose of the claim

upon its merits. The judge has no power to make any other orders than these, except incidental orders, subservient to, and not inconsistent with, the order to try. The 2d section provides that the judgment in any such action or issue as may be directed by the court or judge, and the decision of the court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them. Then comes the 3d section, which alone gives the judge or court the power of barring the claimant. It enacts, "that, if *197] *such third party shall not appear upon such rule or order, to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the court or judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators; saving, nevertheless, the right or claim of such third party against the plaintiff; and thereupon to make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable." That, I conceive, applies only, if the party shall not appear, or, appearing, shall neglect or refuse to comply with any rule or order that shall be made after appearance. So that, the 2d section having provided for the finality of the summary decision made where the parties consent, the 3d section provides for the case of non-compliance with an order made by the judge after appearance. Here, there has been no decision by consent upon the merits, and no order after appearance: therefore no case has arisen, in which the judge had power to bar the claimant. That appears to me to be the literal construction of the act: and it is also quite in conformity with the spirit of the act. This act is a substitute for the old proceeding by bill of interpleader in the court of Chancery,^(a) in which the object simply was the protection of a disinterested party standing between two hostile claimants. His relief accomplished, the next object was, to leave the rights of the two conflicting parties as nearly as possible as they were before the interpleader. The construction, therefore, which holds that the claimant is *198] to be barred if he makes no affidavit, or if he produces *an insufficient affidavit, is evidently contrary to the spirit of the act. At the time of making the claim, the party had a clear and undoubted right to bring an action, and could not be compelled, except in the regular course, to disclose the nature of his claim. To qualify or take away from him any portion of that right, has no tendency to benefit the defendant, who applies for the interpleader. Why, then, should any such difficulty be imposed upon the one party rather than upon the other? The object of the statute was, not to limit or control the common law rights of suitors, any further than was necessary for the security of the defendant or of the sheriff. But it may be asked, what is the use of giving power

(a) Com. Dig. Chancery (3 T).

to the court or the judge to make an order, if the party may disobey it with impunity? In answer to that, I say the punishment for such disobedience,—whatever it may be,—is not the forfeiture of his claim. The judge is empowered to call on the claimant to state the nature and particulars of his claim, in order to enable the plaintiff to see whether or not he will persist. The disobedience of the order to appear for that purpose, may possibly influence the judge's discretion as to the costs. That seems to me to be an answer to the suggestion that the enactment would be idle, unless the judge had power to bar the claimant for not appearing and stating the nature and particulars of his claim to his satisfaction. A case of *Powell v. Lock*, 3 Ad. & E. 315, has been referred to. That was an application to the court for an interpleader. There, no affidavit at all was produced on the part of the claimant. It was objected, on the part of the plaintiff, that the party was therefore not before the court. The matter underwent some little discussion; and the court decided that an affidavit was necessary, and gave the party time to produce one. Nothing, however, was *said as to claimants being barred.^(a) [*199 That point was not entered into. I do not think the court at all intended to go into the consideration of whether, contrary to the words and the spirit of the act, they should take away from the party a right she had, and subject her to a jurisdiction to which there was no necessity to subject her. Upon the broad ground, therefore, that no affidavit at all is necessary as a condition-precedent to the right of the judge to direct an issue, and to make the other subsidiary orders thereon, I think this order should be rescinded. But, assuming that I am wrong in this view, I agree with the lord chief justice in thinking that an affidavit by the claimant himself, at all events, is not indispensable. There is certainly nothing in the act that requires the claimant to make an affidavit in person: and there would be nothing reasonable or just in making *that* a condition-precedent. I cannot suppose that the order was made on the ground that my brother COLTMAN thought it necessary that the claimant himself should make an affidavit. I should rather think he proceeded upon an opinion that the claim was insufficiently made out. If that were so, I do not think he was warranted in the conclusion he came to.

CRESSWELL, J. I concur with my lord and my brother MAULE in thinking that an affidavit by the claimant himself was not necessary, and that the affidavit of claim here brought to the notice of the learned judge, was sufficient. As at present advised, however, *I do not concur [*200 with my brother MAULE in thinking that no affidavit at all is necessary to entitle the judge to entertain the claim. I have always, at chambers, acted upon the case of *Powell v. Lock*. If the party has no

(a) In the report of this case in 1 Harr. & W. 281, it appears that the claimant *did* make an affidavit, though an insufficient one, inasmuch as it only stated generally that she had a valid claim, but did not state the nature and particulars thereof. It appears also that the power of the court to bar the claimant upon this ground, was discussed.

locus standi to maintain his claim, the power to bar him would seem necessarily to be called into existence. The question, however, is one of much importance; and I should be sorry now, without time for fuller consideration, to commit myself to a final opinion upon it. It is enough upon the present occasion to say, that, taking into account the claimant's absence from England, the affidavit of his attorney is sufficient to show that the claim is not groundless and illusory.

V. WILLIAMS, J. I have the misfortune in this case to differ from the rest of the court. The court ought not to rescind an order made by a judge at chambers, unless they are satisfied that his decision is erroneous. I should conceive that the decision of the learned judge here was erroneous, if I thought he decided upon the ground of the absence of an affidavit by the claimant himself. But he appears to me to have decided on the ground that he thought the claimant had not *sufficiently* brought the claim before him: and if so, (a) I think he was right. I forbear to express any decided opinion upon the subject: but the inclination of my mind is, that the statute requires the party, not to state a *sufficient* claim, but to state his claim *sufficiently*. I think he does not appear and maintain his claim, unless he states the nature and particulars of it with such a degree of precision and certainty as to enable the judge to *201] form an opinion as to the propriety *of putting it in a course of inquiry. The judge must determine whether the statement is sufficient or not: and, to enable him to entertain it, it must be upon affidavit. If, therefore, the learned judge has in this case decided that the claim was not sufficiently stated, I am not satisfied that the conclusion he came to was wrong. As, however, the majority of the court entertain a different opinion, the rule will be made absolute in the ordinary form of an interpleader rule.

Bramwell, for the execution-creditor, asked that it might be made part of the rule, that the claimant should give security for costs, he being resident abroad. (b)

Per curiam. Be it so. . . Rule absolute accordingly.

(a) The circumstance of the learned judge having adjourned the summons a second time, to enable the attorney to amend his statement of the claim, shows that this was so.

(b) See *Benazech v. Bessett*, 1 Man. Gr. & S. 313.

POWELL v. BRADBURY and Another. Jan. 22.

In an action for the breach of a contract to employ the plaintiff for a given time, charging the defendants with having wrongfully and without reasonable or probable cause dismissed the plaintiff, the defendants pleaded, that they did not *wrongfully, without reasonable or probable cause*, dismiss the plaintiff, *modo et forma*:—Held, that this merely put in issue the fact of the dismissal, the rest being immaterial.

ASSUMPSIT upon a contract by the defendants to employ the plaintiff for two years as joint editor of a newspaper called *The Daily News*: Breach, that, during the two years, the defendants, wrongfully, and without reasonable cause, dismissed and discharged the plaintiff from their employ.

The defendants, amongst other pleas, pleaded that *they did not wrongfully, and without reasonable or probable cause, dismiss [*202 or discharge the plaintiff from their employ, in manner and form as alleged in the declaration.

The cause was tried before WILDE, C. J., at the sittings in London after Hilary Term, 1847, when the jury returned a verdict for the plaintiff, damages, 500*l*.

The *Attorney-General*, in the following Easter term, obtained a rule nisi for a new trial, on the ground that evidence tendered on the part of the defendants, to show that the plaintiff had been guilty of misconduct that justified them in discharging him, had been improperly rejected; and also, on the ground that the verdict was against evidence, and that the damages were excessive.

Wilkins, Serjt., *Huddleston*, and *Hugh Hill*, showed cause. Affirmative evidence was not by law admissible upon a plea of justification like this. In *Frankum v. The Earl of Falmouth*, 2 Ad. & E. 452, the plaintiff declared that he was possessed of a mill, and by reason thereof was entitled to the use of a certain stream for the mill, and that the water ought to run and flow to the mill, and that the defendant "wrongfully and injuriously" diverted the same: and it was held, that, on a plea of not guilty, the only matter in issue was, the fact of the diversion; and that the right to the use of the stream, as claimed, was admitted. In *Howden v. Standish*, 6 Man. Gr. & S. 504, in case against the sheriff, the declaration set out a writ of *capias*, issued by the order of a judge under the 1 & 2 Vict. c. 110, s. 3, against one K., and alleged that K. was within the bailiwick, and that the defendant could and might and ought to have arrested him, but did not, although often requested, take him or cause *him to be taken, and afterwards falsely returned [*203 that he was not found in his bailiwick. The defendant pleaded, amongst other pleas, not guilty, and that he could not nor might have arrested K.: and it was held, that it was not competent to the defendant, under either of these pleas, to adduce evidence of directions given by the plaintiff to the officer not to arrest K., at a time when he might have taken him; such evidence consisting of *affirmative* matter in excuse of the breach of duty complained of, and therefore not being admissible under not guilty; and the effect of the other plea being merely to deny that K. was in the sheriff's bailiwick under such circumstances that there was an opportunity to arrest him. The *Bishop of Meath v. The Marquess of Winchester*, 3 N. C. 183, 3 Scott, 561, is an authority to the

same effect. [V. WILLIAMS, J. You must contend that the plea is entire, otherwise your argument is not material.]

The Attorney-General and Wells, in support of the rule. It was not necessary to prove the whole of the plea. In *Chitty on Pleading*, (a) it is said: "The statement of immaterial or irrelevant matter or allegations, is not only censured as creating unnecessary expense, (b) but also frequently affords advantage to the opposite party, either by affording him matter of objection on the ground of variance, or as rendering it incumbent on the party pleading to adduce more evidence than would otherwise have been necessary. If, however, the matter necessarily stated be *wholly foreign* or irrelevant to the cause, so that no allegation *204] whatever on the subject was necessary, it will be rejected as *surplusage, and it need not be proved." (c) Thus, in *Davis v. Chapman*, 2 M. & G. 921, 3 Scott, N. R. 238, a plea to a declaration against a gaoler for the escape of J. S., a debtor in execution, after stating a return into custody before action brought, alleged that the defendant did thereupon keep and detain, and from thence hitherto hath kept and detained, and before and at the commencement of the suit kept and detained, and still doth keep and detain the said J. S. in his custody, in execution at the suit of the plaintiff. It was held that the latter words were surplusage, and did not render an escape, after the commencement of the suit, and before plea pleaded, admissible in evidence, upon a replication *de injuriâ*. And see 2 Wms. Saund. 395 c. n. (2).

MAULE, J. The whole court are agreed in opinion that this plea only puts in issue the fact of the plaintiff's dismissal from the employ of the defendants; and that, whether or not that dismissal was wrongful and without reasonable or probable cause, was altogether immaterial, and need not be proved. But, as to whether the verdict was warranted by the evidence, there is some doubt in the mind of the court; and, that being so, and the lord chief justice, who tried the cause, not being satisfied with the result, there must be a new trial upon payment of costs.

Rule absolute accordingly.

(a) 6th edit., Vol. 1, pp. 228, 229. 7th edit., Vol. 1, pp. 261, 252.

(b) Citing *Dundas v. Lord Weymouth*, Cowp. 665, *Price v. Fletcher*, Cowp. 727, *Bristow v. Wright*, 2 Dougl. 665; and see the note [F. 2, p.] 668.

(c) Citing *Dukes v. Gostling*, 1 N. C. 588 (1 Scott, 570, 1 Hodges, 120); *Constable v. Clowbury*, Noy, 75 (Palmer, 397, Hardnes, 69); *Jenk. Cent.* 260 pl. 59; *Edwards v. Hammond*, 3 Lev. 132 (2 Shower, 398, per nom. *Stocker v. Edwards*, 1 N. R. 324 n.); *Scatterwood v. Edge*, 1 Salk. 229; *Plowd. Com.* 30 a., 32 b.; 2 Stark. Evid., 2d edit. p. 686.

*205] *PILGRIM v. THE SOUTHAMPTON AND DORCHES- TER RAILWAY COMPANY. Jan. 31.

A declaration in case charged the defendants, in the first count, with digging trenches across a lane over which the plaintiff had a right of way: in the second, with severing pipes which con-

veyed water to the plaintiff's messuage; and in the third, with stopping a drain for carrying away the foul water from the premises.

Plea, that by a certain act of parliament, the defendants were authorized to construct a certain railway; that they had agreed with the plaintiff for the purchase of a portion of the land of the plaintiff near to her messuage; that the making of the railway, and carrying the same near to the plaintiff's messuage, being likely to occasion injury and inconvenience to the plaintiff, it was agreed that the defendants should pay to the plaintiff, for and in respect of the purchase of the said land, such a sum as should be sufficient to compensate her, not only for the value of such land, but also for all such injury and inconvenience as should necessarily arise from or be incidental to the making of the railway, and carrying the same near to the said messuage of the plaintiff; that, in pursuance of such agreement, and before the committing of the alleged grievances, by a deed between the plaintiff and certain other persons having an interest in the said land, the plaintiff and those other persons, in consideration of 575*l.*, &c., conveyed the land to the defendants for the purpose of making the railway; that it was declared by the deed, that the 575*l.* so paid should be, and then was, accepted and taken by the plaintiff and the other persons, for the purchase of the land, and by way of full compensation for all damage, loss, or inconvenience which could or might be sustained by them, or any of them, by severance, or otherwise by reason of the exercise of any of the powers of the act,—the said 575*l.* being the sum so theretofore agreed to be paid as aforesaid to compensate the plaintiff, not only for the price and value of the land, but also for all such injury and inconvenience as should necessarily arise from or be incidental to the making of the railway, and carrying the same near to the plaintiff's messuage. The plea then went on to aver, that the grievances complained of were part of the injury and inconvenience necessarily arising from and incidental to the making of the railway, and carrying the same near to the plaintiff's messuage, and were part of the damage, loss, and inconvenience sustained by the plaintiff by reason of the exercise of the powers of the act, and intended to be compensated by and included in the said compensation money so paid as aforesaid.

The plaintiff, in her replication, craved oyer of the deed, and demurred generally.

The deed, as set out on oyer, recited that the plaintiff and others had agreed to sell the land in question, and the defendants to purchase the same for the purposes of their railway, for the residue of a certain term therein; and that the plaintiff and the others had agreed to accept and take, and the defendants had agreed to pay 575*l.* for the said land, &c., "by way of full compensation for all damages, loss, or inconvenience whatsoever which could or might be sustained by any person or persons (except the reversioners), by severance, or otherwise by reason of the exercise of any of the powers of the said act upon the said lands, &c., so agreed to be purchased as aforesaid." It then proceeded to state that the plaintiff and others, in consideration of 575*l.*, conveyed all their interest in the said portion of the said land to the defendants:—

Held, that the plea, as a plea of compensation, was bad in substance, inasmuch as the deed did not show that the 575*l.* was paid and received as compensation for the grievances complained of in the declaration:—

Held also, that the plea was not so framed as to show that the acts complained of were done under the authority of the act of parliament.

THIS was an action upon the case against the defendants, for an alleged obstruction of the plaintiff's enjoyment of certain easements. The declaration contained three counts.

*The first count stated, that, before and at the times of the committing of the grievances by the defendants thereafter in [*206 that count mentioned, the plaintiff was, and from thence continually had been, and still was, lawfully possessed of a certain messuage and yard, with the appurtenances, situate, &c.; that the plaintiff, during all the time aforesaid, ought to have a certain way from the said messuage and yard, unto, into, through, over, and along a certain common field in the said county, and from thence unto, into, through, and along a certain close in the said county, used as a lane, and from thence unto and into a certain common or public highway there, and so from thence back again from the said common highway, unto, into, through, and along the said

close, and from thence unto, through, and along the said common field, unto the said messuage and yard respectively so in the possession of the plaintiff, for herself and her servants, and for all others occupying or resorting to the said messuage and yard, on foot and with horses, mares, and geldings, carts, wagons, and other carriages, to go, return, pass, and repossess every year, and at all times of the year, at her and their free will and pleasure; yet that the defendants, well knowing the premises, *207] but intending to injure the plaintiff *in that behalf, and to deprive her of the use and benefit of her said way, whilst the plaintiff was so entitled and possessed as aforesaid, to wit, on the 1st of June, 1846, and on divers other days and times between that day and the commencement of this suit, wrongfully and unjustly broke and entered into and upon the said way, and with feet in walking, and with cattle, carts, and carriages, subverted and spoiled the soil of the said way, and also then cut, dug, and made, in, upon, and across the said way divers, to wit, fifty holes, fifty trenches, and fifty excavations, of the length, depth, and breadth respectively, to wit, of 500 feet, and also then put and placed in and upon the said way, to wit, 50 cartloads of stones, 50 cartloads of lime, 50 cartloads of rubbish, and 50 cartloads of wood, and kept and continued the same in and upon the said way, to wit, thence hitherto, and thereby during all the time aforesaid, the said way was, and still remained, greatly obstructed and stopped up, and the plaintiff could not, nor can she, enjoy the same, and was and is deprived of the use and benefit thereof.

The second count stated, that, before and *at the time of the committing of the grievances by the defendants thereafter in that count mentioned, the plaintiff was, and from thence continually had been, and still was, lawfully possessed of the said messuage and yard, with the appurtenances, and the plaintiff, during all the time aforesaid, ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of certain water for the supply of the said messuage, which water, during all that time, ought to have run and flowed, and still of right ought to run and flow, through and along certain pipes from a certain reservoir in, through, and along a certain close near and adjoining to the said messuage and yard of the plaintiff, and unto and into the said *208] messuage and yard of the *plaintiff, for the supply of the same messuage with water, for the necessary purposes thereof; and that, theretofore, and whilst she the plaintiff was so possessed and entitled as aforesaid, to wit, on the 1st of June, 1846, the defendants well knowing the premises, but contriving and intending to injure the plaintiff in this behalf, wrongfully and unjustly cut, dug, and made a certain excavation or cutting, of great length, breadth, and depth, to wit, of the length of 500 feet, of the breadth of 100 feet, and of the depth of 60 feet, in and across the said close in, through, and along which the said water so flowed as aforesaid, and cut and severed the said pipes, and

intercepted and cut off the flow of the said water, and kept and continued the same so cut, severed, and intercepted for a long space of time, to wit, from thence hitherto, and thereby, during all that time, wrongfully and injuriously hindered and prevented the said water from flowing, as it might and otherwise would have done, unto and into the said messuage and yard of the plaintiff, and the plaintiff was, during all that time, wholly deprived of the benefit and advantage of the said water for the supply of the said messuage.

The third count stated, that the plaintiff, before and at the several times of the committing of the grievances thereafter mentioned, was, and from thence continually had been, and still was lawfully possessed of the said messuage and yard, with the appurtenances, and that the plaintiff, for the necessary use and enjoyment of her said premises, ought, during all those times, and from thence continually, to have had, and still of right ought to have, the use and benefit of a certain channel, drain, waste-pipe, or sewer, in the county aforesaid, leading and running by and from the said messuage and yard of the plaintiff, unto and into certain other drains, by and along which the channel, drain, waste-pipe, or sewer, the refuse and foul water and other filth running and *pro- [209 ceeding from the said messuage and yard of the plaintiff, during all that time, ought to have run and flowed and passed off, and still of right ought to run and flow and pass off into the said other drains, away from the said messuage and yard; yet that the defendants, well knowing the premises, but contriving to injure the plaintiff in this behalf, whilst the plaintiff was so possessed of the said messuage and yard, to wit, on the 1st of June, 1846, wrongfully and injuriously closed, stopped up, and obstructed the said channel, drain, waste-pipe, or sewer, and wrongfully and injuriously kept and continued the same so closed, stopped up, and obstructed for a long space of time, to wit, from thence hitherto, and thereby, during all the time aforesaid, divers large quantities of the refuse and foul water and other filth arising from the said messuage and yard of the plaintiff, had been and were prevented and hindered from running, flowing, and passing off in their usual course, and as they otherwise would have done, through and along the said channel, &c., and from thence into the said other drains, in the manner aforesaid: by reason whereof, not only divers noisome, noxious, offensive, and unwholesome smells and vapours, during all the time aforesaid, had ascended and come into the said messuage and yard of the plaintiff, but also thereby the said premises of the plaintiff became and were thereby greatly overflowed, and the plaintiff and her family thereby had been and were greatly annoyed and inconvenienced and prejudiced in the occupation, enjoyment, and possession thereof, and the plaintiff was and is otherwise injured.

The defendants pleaded, ninthly, as follows:—That, before, and at the time of the committing of the said several alleged grievances in the declaration mentioned, the defendants, under and by virtue of a certain

*210] act of parliament, made and passed in the eighth year of the *reign of Queen Victoria, for making a railway from Southampton to Dorchester, with a branch to the town of Poole, were authorized and empowered to make the said railway in the said act mentioned, and to make and carry the same near to the said messuage and premises of the plaintiff in the declaration mentioned,—whereof the plaintiff then had notice; that, for the purpose of making the said railway, according to the provisions of the said act of parliament, the defendants, before the committing of the said alleged grievances, to wit, on the 25th of April, 1846, with the consent of the plaintiff, contracted and agreed with the plaintiff, by a certain agreement then made in writing, for the purchase of a certain portion of the land of the plaintiff near to her said messuage and premises; that, whereas the making of the said railway according to the provisions of the said act of parliament, and carrying the same near to the said messuage and premises of the plaintiff, were likely to occasion certain injury and inconvenience to the plaintiff, it was thereby then also agreed by and between the plaintiff and the defendants, that the defendants should pay to the plaintiff, for and in respect of the purchase of the said portion of land, *such a sum of money as should be sufficient to compensate the plaintiff, not only for the price and value of the said portion of land they so purchased as aforesaid, but also for all such injury and inconvenience as should necessarily arise from or be incidental to the making of the said railway, and carrying the same near to the said messuage and premises of the plaintiff as aforesaid*; that, in pursuance of the said contract and agreement, afterwards, and before the committing of the said alleged grievances in the declaration mentioned, to wit, on the 27th of June, 1847, by a certain deed of assignment then made by the plaintiff *and certain other persons* then having an interest in or title to the said portion of land,—and which said deed of assignment, sealed

*211] with the *seal of the plaintiff, the defendants then brought there into court, the date whereof was, to wit, the day and year last aforesaid,—the plaintiff *and the said other persons*, in consideration of a certain large sum of money, to wit, the sum of 575*l.*, then paid by the defendants to the plaintiff, and of a certain deed of covenant then made and executed by the defendants, the plaintiffs, and the said other persons in the said deed of assignment mentioned, then conveyed and assigned to the defendants, their successors and assigns, the said portion of land, for the purpose of making the said railway in the manner aforesaid; that it was then declared and agreed in and by the said deed of assignment, that the said sum of 575*l.*, so paid as aforesaid, should be accepted and taken by the plaintiff and the said other persons, and the plaintiff and the said other persons did thereby then accept and take the said sum of 575*l.* for the purchase of the said portion of land, and by way of full compensation for all damage, loss, or inconvenience whatsoever, which could or might be sustained by them, or any of them, by

severance, or otherwise by reason of the exercise of any of the powers of the said act *upon the lands, hereditaments, and premises so agreed to be purchased, and so purchased as therein mentioned*,—the said sum of 575*l.* being the sum so theretofore agreed to be paid as aforesaid, to compensate the plaintiff, not only for the price and value of the said portion of land, but also for all such injury and inconvenience as should necessarily arise from or be incidental to the making of the said railway, and carrying the same near to the said messuage and premises of the plaintiff as aforesaid; and that the said several alleged grievances in the declaration mentioned, were part of the injury and inconvenience necessarily arising from and incidental to the making of the said railway, and carrying the same near to the said messuage and premises of the *plaintiff as aforesaid, and were part of the damage, loss, and [*212 inconvenience sustained by the plaintiff by reason of the exercise of the powers of the said act, and intended to be compensated by, and included in, the said compensation and money so paid to the plaintiff by the defendants as aforesaid, the defendants doing no unnecessary damage to the plaintiff on the occasions aforesaid,—verification.

The plaintiff claimed oyer of the deed of assignment mentioned in the ninth plea. The deed, as set out on oyer, recited an indenture of lease of the 29th of September, 1807, whereby certain lands and hereditaments (including the messuage and premises of the plaintiff) were demised by one William Fitzhugh to Maria Deborah Grosvenor for fifty years from the date thereof, the residue of which term was assigned to C. Pilgrim, in 1834, who died in 1845, leaving the plaintiff, Maria Pilgrim, his widow, a life-interest in the term, with remainder to Charles Henry Pilgrim, John Bunce Pilgrim, Charles Pilgrim, and Thomas Penrose; it then recited that the said Maria Pilgrim, and the said Charles Henry Pilgrim, John Bunce Pilgrim, Charles Pilgrim, and Thomas Penrose, had agreed to sell, and the Southampton and Dorchester Railway Company, incorporated by the Southampton and Dorchester Railway Act, 1845, had agreed to purchase, for the purposes of their railway, the lands and tenements thereafter described, and thereby assigned, or intended so to be, with their appurtenances, for the residue of the said term of fifty years; and that the said Maria Pilgrim, and Charles Henry Pilgrim, John Bunce Pilgrim, Charles Pilgrim, and Thomas Penrose, had agreed to accept and take, and the company had agreed to pay, the sum of 575*l.* for the purchase of the said lands and tenements, and by way of full compensation for all damages, loss, or inconvenience whatsoever which could or might be sustained by any person or persons whomsoever (except the person or persons entitled to the reversion and [*213 inheritance expectant on the determination of the said term), by severance, or otherwise by reason of the exercise of any of the powers of the said act *upon the said lands, hereditaments, and premises so agreed to be purchased as aforesaid*; and that, upon the said treaty, it was further

agreed between the said parties last aforesaid, and it was part of the consideration for the said sale, that the said company should, at their own expense, make, do, and perform, and, during the residue of the said term, maintain, certain works and communications, and which by an indenture of covenant bearing even date with those presents, and made between the said company of the one part, and the said Maria Pilgrim, Charles Henry Pilgrim, John Bunce Pilgrim, Charles Pilgrim, and Thomas Penrose, of the other part, were covenanted to be made; but that it was, upon the said treaty, fully understood and agreed that the said company should not at any time or times thereafter be called upon or required by any person or persons whomsoever, except the person or persons entitled to the reversion and inheritance expectant on the determination of the said term of fifty years, to make or allow to be made any communication or works whatsoever (except the communications and works mentioned in the said indenture of covenant) over, under, or across the said railway, for the accommodation of the said lands and hereditaments adjoining the lands and hereditaments thereby assigned, or intended so to be. The indenture then witnessed, that the said Maria Pilgrim, the plaintiff, and the said Charles Henry Pilgrim, John Bunce Pilgrim, Charles Pilgrim, and Thomas Penrose, in consideration of the sum of 575*l.* paid to *them* by the said company, and of the deed of covenant thereinbefore mentioned, did thereby assign to the said company, *214] their successors and assigns, all, so much, and such *parts of all those pieces or parcels of land, situate, &c., as were comprised in the thereinbefore in part recited indentures of lease and assignment, and in the map or plan of the said railway deposited in the office of the clerk of the peace of the county of Southampton, numbered respectively, 21, 27, 28, and 29, as have been staked or otherwise marked out and selected for the purposes of the said railway, and containing, &c., &c.,—a plan of which said lands and hereditaments intended to be thereby assigned, was drawn in the margin of those presents, wherein the same lands, hereditaments, and premises were coloured red, and were numbered as in the said map or plan so deposited in the office of the clerk of the peace as aforesaid, together with all ways, rights, and appurtenances thereto belonging; and all such estate, right, title, &c., as the said act empowered them to assign,—to hold the same to the said company, their successors and assigns, for all the residue then to come and unexpired of the said term of fifty years, according to the true intent and meaning of the said act. Upon the back of the deed was endorsed a receipt for the 575*l.* (signed by Charles Henry Pilgrim, John Bunce Pilgrim, Charles Pilgrim, and Thomas Penrose), “being the full consideration money within mentioned to be paid by the company to us.” The plaintiff then demurred, and the defendants joined in demurrer.

Greenwood, in support of the demurrer.(a) The declaration com-

(a) The points marked for argument on the part of the plaintiff, were,—That the deed of

plaints of three several acts done by the *defendants upon lands not belonging to her,—first, the cutting of trenches across a lane over which she had a right of way,—secondly, the severing of pipes which conveyed water to the plaintiff's premises,—thirdly, the stopping of a drain for carrying away the foul water from the said premises. The plea in substance states, that, by a certain act of parliament, the defendants were authorized to construct a certain railway; that they had agreed *with the plaintiff* for the purchase of a portion of the land of the plaintiff near to her messuage; that the making of the railway, and carrying the same *near to* the plaintiff's messuage, being likely to occasion injury and inconvenience to the plaintiff, it was agreed that the defendants should pay to the plaintiff, for and in respect of the purchase of the said land, such a sum as should be sufficient to compensate her, not only for the value of such land, but also for all such injury and inconvenience as should necessarily arise from or be incidental to the making of the railway, and carrying the same *near to* the said messuage of the plaintiff; that, in pursuance of such agreement, and before the committing of the alleged grievances, by a deed between the plaintiff and certain other persons having an interest in the said land, the plaintiff and those other persons, in consideration of 575*l.*, &c., conveyed the lands to the defendants for the purpose of making the railway; that it was declared in and by the deed, that the 575*l.* so paid should be and then was, accepted and taken by the plaintiff and the other persons for the purchase of the land, and by way of full compensation for all damage, loss, or inconvenience which could or might be sustained by them, or any of them, by severance, or otherwise by reason *of the exercise of any of the powers of the act,—the said 575*l.* being the sum so theretofore agreed to be paid as aforesaid to compensate the plaintiff, not only for the price and value of the land, but also for all such injury and inconvenience as should necessarily arise from or be incidental to the making of the railway, and carrying the same *near to* the plaintiff's messuage. The plea then goes on to aver that the grievances complained of were part of the injury and inconvenience necessarily arising from and incidental to the making of the railway, and carrying the same *near to* the plaintiff's messuage, and were part of the damage, loss, and inconvenience sustained by the plaintiff by reason of the exercise of the powers of the act, and intended to be compensated by and included in the said compensation money so paid as aforesaid. The deed, as set out on oyer, states the 575*l.* to have been paid and accepted as the price of

assignment was not set out in the ninth plea, either in its terms, or according to its legal effect, and that there was a material variance, in several particulars, between the deed as stated in the said ninth plea and the deed as set out on oyer; that the ninth plea did not show, either by direct allegation, or inferentially, that the grievances committed were so committed upon any part of the said premises purchased and assigned; and that it appeared from the deed, as set out, that the sum of 575*l.*, which was the consideration for the said purchase and assignment, was not, nor was any part thereof, paid or accepted by way of compensation for the said grievances, or any part thereof.

the portion of land contracted to be sold, and "by way of full compensation for all damages, loss, or inconvenience which could or might be sustained by any person or persons whomsoever (except, &c.,) by severance, or otherwise by reason of the exercise of any of the powers of the said act upon the said lands, &c., so agreed to be purchased as aforesaid." The plea, in effect, seeks to extend the justification by reference to the prior agreement. The question that arises, therefore, is this,—whether, where parties have agreed by *parol* that a given sum shall be paid as the price of certain land, and as compensation for prospective damages *generally*, and they afterwards make that agreement the subject of a *deed* which limits the compensation to *particular* damage in respect of acts done upon the land so purchased, the *agreement* can be pleaded as an answer to an action for damage not covered by the *deed*. It is submitted that it cannot; or, in other words, that the agreement becomes merged *217] in the deed. *The plea is therefore bad in substance, inasmuch as it does not cover the grievances in the declaration.

There is a fatal variance between the statement of the deed in plea, and the deed itself. The plea alleges that the plaintiff and certain other persons conveyed *the land* to the defendants; whereas, the deed shows that all that passed by the deed, was, *the residue of a term of years*.

Further, the plea alleges that the conveyance was made in consideration of 575*l.* paid by the defendants *to the plaintiff*; whereas the deed shows that it was in consideration of 575*l.* paid to the plaintiff *and the other persons*. An allegation of seisin, in pleading, is always understood to mean that the party is *sole* seised. (a) In trover, the declaration stated that the plaintiff was possessed as of his own property, of certain cattle, to wit, four horses; which the defendant converted and disposed of to his own use. The defendant pleaded,—first, that the horses were not the property of the plaintiff,—secondly, that a judgment was recovered against J. F., and that the defendant (a sheriff's officer) seized them under an execution against the said J. F., the same being the goods and chattels of the said J. F., and liable to be seized and taken as aforesaid, and not being the property of the plaintiff. The plaintiff replied, that they were the cattle and property of the plaintiff, *modo et formâ*. At the trial, the jury found that the horses were the property of the plaintiff and J. F. jointly: and it was held, that the issue raised by the defendant was, whether the cattle were the *sole* property of J. F., and, the jury having found that they were the joint property of the plaintiff and J. F., that the plaintiff was entitled to recover: *Farrar v. Beswick*, M. & W. 682. *218] [V. WILLIAMS, J. To enable you to take advantage of it, *the variance must be such as would be fatal on non est factum: *Paine v. Emery*, 2 C. M. & R. 304.

Badeley, contrâ. (b) The plea is good in substance. The argument

(a) Vide 7 M. & G. 173 n.

(b) The points marked for argument on the part of the defendants were,—That the ninth plea

on the other side assumes that the subject-matter of the agreement is merged and concentrated in the deed. That is not so. The plea is founded upon the agreement: the deed only shows how one portion of the agreement was carried into effect. The agreement is in the nature of an accord executed between the parties. The plea shows an agreement for compensation, a deed carrying out that agreement, and a payment to the plaintiff under the deed. In Phillips on Evidence,^(a) it is said: "It is an established rule, that a party may prove some other consideration besides that expressed in the deed, provided it is consistent with the consideration expressed. Thus, if a deed of bargain and sale is expressed generally to be made 'for divers good considerations,' it may be averred and proved that the bargainee gave money or other valuable consideration.^(b) That such an averment may be taken, which stands with the deed, says *Lord COKE, although it be not expressly comprised in the deed, is proved by the case of Villers v. Beaumont,^(c) where the consideration of a deed of bargain and sale of lands was stated to be a sum of money, but it was averred, and found by the jury, that the indenture was made 'as well in consideration of marriage (to make it a jointure in bar of dower) as of the said sum of money;' and it was adjudged, that, although there was a particular consideration mentioned in the deed, yet an averment might be made of another consideration, which stood with the indenture, and which was not contrary to it. *A fortiori*, adds Lord COKE, the averment may be made where no consideration is mentioned, but the deed is general for 'divers good considerations;' for, then the averment (that the bargainee gave money, &c.) is but an explanation and particularizing of the general words of the deed, which include every manner of consideration; and in all these cases, the matter so averred is traversable and issuable. And Lord HARDWICKE has held, that, where no consideration is expressed in the deed, a party claiming the benefit of a trust under the deed, may prove a valuable consideration."^(d) [WILDE, C. J. The question is, whether you can aver, against the deed, that the 575*l.* was agreed to be paid and accepted in satisfaction of something not covered by the deed.] It is submitted that the deed does cover the whole com-

is sufficient,—that the deed of assignment is properly set out therein according to its legal effect,—that the plea sufficiently shows that the grievances alleged in the declaration were included in, and compensated by, the sum of money mentioned in the deed of assignment, and the money paid thereon is sufficiently shown to be a fulfilment of the agreement mentioned in the said plea,—that the plaintiff is not entitled to maintain the action, inasmuch as it appears upon the record that the injuries alleged arose necessarily from carrying out the provisions of an act of parliament, and that, if she was entitled to any compensation for such injuries, she could only claim or be entitled to it in the manner provided by such act.

(a) 9th edit. Vol. II. p. 353.

(b) Citing 2 Roll. Abr. 786 (N.); Mildmay's case, 1 Co. Rep. 175 a; Lord Cromwell's case, 2 Co. Rep. 76 a; Bedell's case, 7 Co. Rep. 38; Doe d. Milburn v. Salkeld, Willes, 677; Hartopp v. Hartopp, 17 Ves. 192.

(c) Citing Villers v. Beaumont, 2 Dyer, 146 a; Vernon's case, 4 Co. Rep. 3; Craythorne v. Swinburne, 14 Ves. 170.

(d) Citing Peacock v. Monk, 1 Ves. sen. 128.

pensation. [WILDE, C. J. It is expressly confined to injury done to the land sold.] As far as the considerations are expressed on the face of the deed, it certainly does not appear whether the compensation was intended to apply to anything more than the injury to the land sold. But there is clearly nothing inconsistent with the deed in holding *220] that the payment was to cover the whole damage stated in the declaration. It does not contradict the deed, or any recital in it. In *Bowman v. Rostron*, 2 Ad. & E. 295 (b), the declaration stated the execution of a deed by the plaintiff and defendant; the plea did not traverse the execution, but alleged new matter, upon which the replication took issue. The deed was put in at the trial, and its recital directly contradicted the new matter alleged in the plea: it was held, nevertheless, that the defendant was not precluded from submitting such matter of defence to the jury, inasmuch as the plaintiff had not pleaded the recital of the deed by way of estoppel: and, the judge at nisi prius having treated such deed as conclusive, and directed a verdict for the plaintiff, the court granted a new trial, without entering into the question whether the plea was or was not bad. [WILDE, C. J. The agreement provides for the sale of a portion of the land. The deed states the agreement, and then it goes on to recite that the plaintiff and the others have agreed to take, and the company have agreed to pay, 575*l.* for the said lands, &c., by way of full compensation for all damages, loss, or inconvenience which could or might be sustained, by severance, or otherwise by reason of the exercise of any of the powers of the said act, upon the said lands, &c., so agreed to be purchased as aforesaid. It was quite competent to the parties to agree for a sum to be paid as compensation for some only of the matters which had been the subject of the former agreement.] It is submitted that there is enough to show the court, upon general demurrer, at least, that the money was paid in satisfaction of the entire damages, as well as for the land.

In *Smith v. Shaw*, 10 B. & C. 277, 5 M. & R. 225, BAYLEY, J., says: "A thing is to be considered as done *in pursuance of the act*, when the *221] person who does it is acting honestly and *bonâ fide*, *either under the powers which the act gives, or in discharge of the duties which it imposes. Though he may erroneously exceed the powers the act gives, or inadequately discharge the duties, yet if he acts *bonâ fide* in order to execute such powers, or to discharge such duties, he is to be considered as acting in pursuance of the act, and is to be entitled to the protection conferred upon persons whilst so acting. This is established by *Gaby v. The Wilts and Berks Canal Company*, 3 M. & S. 580, *Theobald v. Chrichmore*, 1 B. & Ald. 227, and *Parton v. Williams*, 3 B. & Ald. 330."

It is admitted here that the grievances complained of occurred in the course of carrying out the provisions of the act of parliament. That being so, the plaintiff can be entitled to no damages; or, if she is entitled to compensation, she must pursue the remedies pointed out by the act, in

conjunction with the lands clauses consolidation act. In the case of the Governor and Company of the British Cast Plate Manufacturers v. Meredith, 4 T. R. 794, it was held, that, where the acts of commissioners appointed by a paving-act, occasion a damage to an individual, without any excess of jurisdiction on their part, the commissioners, or pavours acting under them, are not liable to an action. "Some individuals," says Lord KENYON, "suffer an inconvenience under all these acts of parliament; but the interest of individuals must give way to the accommodation of the public." In *Boulton v. Crowther*, 2 B. & C. 703, by the general turnpike-act, 3 G. 4, c. 126, s. 83, the trustees of roads were authorized to divert, shorten, alter, or improve the course of any of the roads under their management, and divert, shorten, vary, alter, and improve the course or path of any roads through or over any commons or waste grounds, or uncultivated lands, without making any satisfaction for the same; and through or over any *private lands, tendering [*222 or making satisfaction to the owners thereof and persons interested therein, for the damage sustained thereby: and it was held, that, under this clause, the trustees were authorized to lower hills and raise hollows; and that they were not liable to an action for a consequential injury resulting from an act which they were authorized to do. Referring to the case last cited, ABBOTT, C. J., there says: "It seems to me that that case is a distinct authority as to the second point now raised. The act of parliament, I think, authorized the trustees to do what they have done. If, in doing the act, they acted arbitrarily, carelessly, or oppressively, the law, in my opinion, has provided a remedy. But the fact of their having so acted, is negatived by the finding of the jury. I am, therefore, of opinion that the defendant was not liable to this action." So, in *Thicknesse v. The Lancaster Canal Company*, 4 M. & W. 472, where a canal act gave the commissioners power to purchase lands, &c., and directed them to make compensation to persons interested therein for all damage sustained,—it was held that a party entitled to an easement over lands so purchased by him, could not maintain trespass for acts done upon those lands to the prejudice of his easement; but that, as soon as any damage was actually sustained, he ought to have claimed compensation under the act. [CRESWELL, J., referred to the *King v. Pease*, 4 B. & Ad. 30. There, by an act reciting that a railway between certain points would be of great public utility, and would materially assist the agricultural interest and the general traffic of the country, power was given to a company to make such railway, according to a plan deposited with the clerk of the peace, from which they were not to deviate more than one hundred yards. By a subsequent act, the company, or persons authorized by them, were empowered to use locomotive engines upon the railway. *The railway was made parallel and adjacent to an [*223 ancient highway, and in some places came within five yards of it. It did not appear whether or not the line could have been made, in those

instances, to pass at a greater distance. The locomotive engines on the railway frightened the horses of persons using the highway as a carriage-road. On indictment against the company for a nuisance, it was held that this interference with the rights of the public, must be taken to have been contemplated and sanctioned by the legislature, since the words of the statute authorizing the use of the engines were unqualified; and the public benefit derived from the railway (whether it would have excused the alleged nuisance at common law or not) showed at least that there was nothing unreasonable in a clause of an act of parliament giving such unqualified authority.]

Greenwood, in reply. The plea professes to set up a justification under the contract: the statement as to the authority of the defendants to make the railway under the act of parliament, is mere inducement: if it had been pleaded as a substantive defence, it would have made the plea demurrable on the ground of duplicity; but, according to the rule laid down in *Stephen on Pleading*, 5th edit. p. 296, "No matter will operate to make a pleading double, that is pleaded only as necessary inducement to another allegation." Besides, the courts will not take notice of acts of parliament, unless they are properly described. Now, there is no such act of parliament as that stated in this plea. The royal assent was given to it on the 21st of July, 1845, which was in the 9th year of the reign of Her present Majesty: it should have been described, therefore, as an act passed in the 9th year, or at all events in the 8th and 9th years of *224] the reign. [V. WILLIAMS, J. Is not the title *of the act given?] No: only what the pleader conceives to be the object of the act.

By the 53d section of the lands clauses consolidation act, 1845, 8 & 9 Vict. c. 20, it is provided, that, before roads are interfered with, others are to be substituted: and by s. 55 it is enacted that, "if any party entitled to a right of way over any road so interfered with by the company, shall suffer any special damage by reason that the company shall fail to cause another sufficient road to be made before they interfere with the existing road, it shall be lawful for such party to recover the amount of such special damage from the company, with costs, by action on the case in any of the superior courts, and that whether any party shall have sued for such penalty as aforesaid or not, and without prejudice to the right of any party to sue for the same." This bargain between the legislature and the promoters of the railway company, is to be construed like any other contract. [CRESSWELL, J. You do not allege any special damage from the stopping of the way.] No.

WILDE, C. J. It appears to me that the plea is bad, and that the plaintiff is entitled to judgment upon it. The first question is, whether the plea addresses itself to the grievances complained of in the declaration, and shows that the plaintiff has received compensation for them. The way in which it proposes to show that, is this,—it sets out an agreement, by which it is alleged, that, before the committing the grievances

in the declaration mentioned, the defendants agreed with the plaintiff to purchase a certain portion of land for such a sum of money as should be a sufficient compensation, not only for the value of the land, but also for all such inconvenience and collateral damage as might be incidental to the making of the railway. If the plea *were insufficient, the terms of the agreement are wide enough to include [*225 the damage complained of here. The plea then proceeds to state that the sum was ascertained and agreed at 575*l.*, before the committing of the grievances complained of, and sets out the deed by which the transaction was carried into effect, and by which it was declared and agreed that the said sum of 575*l.* so paid as aforesaid, should be accepted and taken by the plaintiff and the other persons interested, and the plaintiff and the said other persons did thereby then accept and take the said sum of 575*l.*, for the purchase of the said portion of land, and by way of full compensation for all damage, loss, or inconvenience whatsoever, which could or might be sustained, by them or any of them, by severance or otherwise, by reason of the exercise of any of the powers of the said act upon the lands, hereditaments, and premises so agreed to be purchased, and so purchased as therein mentioned,—the said sum of 575*l.* being the sum so theretofore agreed to be paid as aforesaid, to compensate the plaintiff, not only for the price and value of the said portion of land, but also for all such injury and inconvenience as should necessarily arise from, or be incidental to, the making of the said railway, and carrying the same *near to* the said messuage and premises of the plaintiff as aforesaid; and that the said several alleged grievances in the declaration mentioned, were part of the injury and inconvenience necessarily arising from, and incidental to, the making of the said railway, and carrying the same *near to* the said messuage and premises of the plaintiff as aforesaid, and were part of the damage, loss, and inconvenience sustained by the plaintiff, by reason of the exercise of the powers of the act before referred to, and intended to be compensated by, and to be included in, the said compensation money so paid to the plaintiff by the defendants as aforesaid. The object of *these allegations in the defendant's plea, is, to extend the effect and operation of [*226 the deed. It appears to me to be an attempt to do that which by law cannot be done: and none of the authorities cited seem to me to have any bearing upon the case. Looking at the plea as one the validity of which depends upon whether it shows that the plaintiff has received compensation for the injury of which she complains, I think it fails in substance.

It is then insisted, that by reason of the closing allegation in the plea, the defendants are entitled to avail themselves of another defence, *viz.* that the acts complained of were done by them under the authority of the act of parliament. It is said, that, where authority is given by the legislature to do an act, parties injured by the doing of it have no legal

remedy, but should appeal to the legislature. That may be very good law. But the question is whether this plea properly advances that defence. The plea comes before us upon general demurrer. It must, therefore, receive a fair and reasonable construction, and is not to be read so as to give to its language a strained construction in favour of the party pleading. So reading the plea, it appears to me that it does not show with sufficient certainty and precision that the acts which the defendants are charged with doing, were authorized to be done by the act of parliament. It does not set up the act in terms which make it a good plea in that sense. Its language is extremely loose, and evidently intends to rely, not upon the act of parliament, but upon the agreement.

CRESSWELL, J.(a) I am of the same opinion. I observe that this is the ninth plea; it has, therefore, in all probability, very little to do with the merits of the case. The defence that was evidently meant to be set *227] up by it, was, that, whatever damage the plaintiff may have sustained by the acts of the railway company was damage for which she has already been compensated under the agreement. That the defendants have failed in showing. The plea states that the defendants agreed with the plaintiff to pay her a certain sum of money for the purchase of certain land, and as a compensation for certain damage. It then goes on to aver,—in order to supply the place of an averment that the sum mentioned was accepted in satisfaction of such damage,—that the money was agreed to be paid to compensate the plaintiff, not only for the price and value of the land, but also for all such injury and inconvenience as should necessarily arise from, or be incidental to, the making of the said railway, and carrying the same near to the said messuage and premises of the plaintiff as aforesaid. It does not say that the things mentioned in the deed are the same as those mentioned in the declaration. The plea then goes on to aver that the said several alleged grievances in the declaration mentioned, were part of the injury and inconvenience necessarily arising from and incidental to the making of the railway, and carrying the same near to the said messuage and premises of the plaintiff, and were part of the damage, loss, and inconvenience sustained by the plaintiff by reason of the exercise of the powers of the act, and intended to be compensated by and included in the said compensation money so paid to the plaintiff by the defendants as aforesaid. That leaves the matter quite ambiguous; it does not say, intended to be compensated *by the deed*. The plea, therefore, is clearly bad as a plea relying upon compensation. Then, the plea not being pleaded over to, its language is open to fair criticism. I do not think it is sufficiently alleged that the acts done by the defendants were done by them *228] under the authority of the act. I therefore think the plaintiff is entitled to judgment.

V. WILLIAMS, J. I am of the same opinion. As a plea that the

(a) MAULE, J., had gone to chambers.

plaintiff has been compensated for the injury of which she complains, I agree, for the reasons already given, that this plea affords no defence. It is said that it amounts to a plea that the damage and injury complained of were a necessary consequence of acts which the defendants were authorized by the act of parliament to do, which, according to the cases of *The Governors and Company of the British Cast Plate Workers v. Meredith*, and *Boulton v. Crowther*,—which are the leading cases upon this subject, affords a good defence. No doubt, if this plea had sufficiently alleged that the defendants did the acts complained of in the exercise of the powers and authorities conferred upon them by an act of parliament, and that the injury was the necessary and unavoidable consequence of those acts, it would have been an answer to the action. But I think the plea does not, in apt and proper language, allege that the injuries complained of were the necessary consequence of acts which were authorized to be done by the act of parliament. I therefore think the plea affords no defence.

Judgment for the plaintiff.

CASES
 ARGUED AND DETERMINED
 IN THE
COURT OF COMMON PLEAS,
 AND IN THE
EXCHEQUER CHAMBER,
 IN
Hilary Vacation,
 IN THE TWELFTH YEAR OF THE REIGN OF VICTORIA

The judges who usually sat *in banco* during these sittings were—
 COLTMAN, J. CRESSWELL, J.
 MAULE, J. V. WILLIAMS, J.

**MAYHEW and Another, Assignees of BARNABAS MAYHEW, a
 Bankrupt, v. HERRICK. Feb. 8.**

One of two tenants in common of a chattel is not liable in trover at the suit of his co-tenant, for the mere sale of the chattel; though he may be, for such a disposition as amounts to a destruction of it.

The defendant, an officer of the Palace Court, seized, under a *fi. fa.* against A., partnership effects of A. and B., and sold them to various purchasers, who carried them away. In trover at the suit of the assignees of B. (who had become bankrupt):—Held, that the seizure and sale, under the circumstances, did not amount to a conversion: but that, in the absence of any evidence to show in what proportions the partners were interested in the partnership property, the assignees of B. were entitled to a moiety of the proceeds of the sale.

THIS was an action against an officer of the Palace Court, for seizing and selling partnership property under a writ of *fi. fa.* against one of the co-partners.

*230] *The first count was in trover, for two hundred barrels, two hundred casks, &c., in the possession of Barnabas Mayhew, before his bankruptcy.

The second count stated, that Barnabas Mayhew, the bankrupt, and one Frederick Smee, before the bankruptcy of Mayhew, and at the

time of the committing of the grievances thereafter mentioned, were lawfully possessed, as of their own property, of divers other goods and chattels, to wit, two hundred barrels, two hundred casks, &c., &c., whereof a small share only, to wit, one hundredth undivided part, of the said goods and chattels of right belonged to the said Frederick Smee,—whereof the defendant, at the time of the committing of the grievances thereafter mentioned, had notice; that, before the committing of the said grievances, to wit, on, &c., a writ of execution of our lady the Queen, to wit, a writ of *fi. fa.*, directed to the bearers of the verges of the household of our said lady the Queen, and the officers and ministers of the court of her palace at Westminster, and every of them, was sued and prosecuted out of the said court of her said palace, by one Thomas Tiley, against the goods and chattels of the said Frederick Smee, for 100*l.* theretofore, by the judgment of the said court, recovered by the said Thomas Tiley against the said Frederick Smee; that the said writ was delivered to the defendant, one of the said bearers of the verges, and an officer of the said court of the palace, to be executed in due form of law; that the defendant, under colour of the said writ, and before the bankruptcy, seized the goods of the said Barnabas Mayhew and Frederick Smee; and that, although the defendant *then well knew that the [231 said Barnabas Mayhew was so entitled to the said share of the said goods as aforesaid, yet the defendant, wrongfully, and under colour of the said writ of execution, wholly sold and disposed of the entirety of the said goods and chattels, for, &c., &c., to divers persons to the plaintiffs unknown, who then, by the procurement of the defendant, and by colour and force of the said sale, eloiigned and carried them away, and disposed of them to their own use; whereby they became wholly lost to the said Barnabas Mayhew, and to the plaintiffs; to the damage of the plaintiffs, as assignees, &c.

The defendant pleaded,—first, to the whole declaration, not guilty,—secondly, to the first count, that Barnabas Mayhew was not, at the said time when, &c., possessed, as of his own property, of the said goods in the first count mentioned, or any of them, or any part thereof,—thirdly, to the second count, that Barnabas Mayhew and Frederick Smee were not, at the said time when, &c., possessed, as of their own property, of the said goods and chattels in the last count mentioned, or any part thereof, in manner and form as in the said last count mentioned: whereupon issue was joined.

The cause was tried before Lord DENMAN, at the last spring assizes at Kingston. The facts that appeared in evidence were as follows:—

The plaintiffs were the assignees of Barnabas Mayhew, who carried on the business of a brewer, in partnership with Frederick Smee, at the Phoenix Brewery, at Bow, in the county of Middlesex. The defendant was an officer of the palace court. In June, 1847, one Thomas Tiley sued Smee to judgment in the palace court for a private debt. Smee

gave Tiley a *cognovit*, upon which (default having been made) judgment was entered up, and execution issued. A *fi. fa.*, endorsed to levy of the *232] goods of Smee 79*l.* 2*s.* 6*d.*, having been delivered to the *defendant to execute, he proceeded to the brewery, and seized all the property he found there, notwithstanding that he was informed that certain of the goods so seized, were the sole property of Mayhew. The whole of the goods were carried away, and were sold on the 27th of July. The balance of the proceeds, about 30*l.* (36*l.* having been paid to the landlord for rent), was handed over to the execution-creditor. Mayhew became bankrupt in August, 1847.

The property said to belong exclusively to Mayhew, consisted of casks and brewing utensils, which had been used in the business before Smee became a partner therein. These were not mentioned in the partnership agreement, which was put in evidence. The partnership was for no specific term.

On the part of the defendant, it was objected, that, whatever might be the plaintiffs' rights as to the separate property of the bankrupt, no action would lie in respect of the undivided share of the partnership property.

Under the direction of his lordship, a verdict, was entered for the plaintiffs upon the first count, for 15*l.* 15*s.*, the value at which the jury estimated the separate property of Mayhew; with leave to the plaintiffs to move to increase the verdict by 75*l.*, one-half the estimated value of the joint property, upon the second count.

Leave was also reserved to the defendant to move to set aside the verdict found for the plaintiffs, and to enter a nonsuit.

Rules nisi were accordingly obtained in Easter term last.

Lush now showed cause against the rule obtained, on the part of the plaintiffs, to increase the damages. The question is, whether a sheriff, *233] who, under a *fi. fa.* *against one of two partners, seizes and sells partnership property, is liable to the solvent partner for the full value of *his* share. There is no trace of any such action having been brought, down to a very recent time. The point was raised, but not decided, in *Burnell v. Hunt*, 5 Jurist, 650. In strictness, the sheriff's duty, in such circumstances, is, to seize the whole, and to sell the undivided moiety, and then the vendee becomes tenant in common with the solvent partner. In the case of *Eddie v. Davidson*, 2 Dougl. 650, where the sheriff pursued the course that was adopted by this defendant, it was held, that, if, on an execution against one of two partners, the partnership goods are taken and sold, the sheriff is to pay over to the other a share of the produce, proportioned to his share in the partnership effects: and it was referred to the master to take the account. That, however, was disapproved of by Lord ELDON, who observes, in *Waters v. Taylor*, 2 Ves. & Bea. 301; (a) "If the courts of law have followed courts of equity

(a) And see *Barker v. Goodair*, 11 Ves. 78; *Young v. Keighley*, 15 Ves. 557; *Dutton v. Morrison*, 17 Ves. 206; *Wait, in re*, 1 Jac. & W. 605.

in giving execution against partnership effects, I desire to have it understood that they do not appear to me to adhere to the principle, when they suppose that the interests can be sold, before it can be ascertained what is the subject of sale and purchase. Courts of law have repeatedly laid down that they will sell the actual interest of the partner, professing to execute the equities between the parties, but forgetting that a court of equity ascertained previously what was to be sold. How can a court of law ascertain what is the interest to be sold, and what the equities depending upon an account of all the concerns of the partners for years?" And in *Parke v. Pistor*, 3 Bos. & Pull. 289, and **Chapman v. Koops*, 3 Bos. & Pull. 289, this court refused to enter into the inquiry as [*234 to the respective interests of the partners. Lord ALVANLEY, in the latter case, says: "I hope this will be the last application that will be made to this court of a similar nature with the present. It appears to me to be most clear, that, without the consent of all parties, the court has no right to restrain the plaintiff from taking advantage of the execution which he has issued. When persons enter into a partnership, they must be aware that the separate concerns of each partner may in some cases introduce a variety of claims very inconvenient to the general partnership concern. By the law of England, the creditor of any one partner may take in execution that partner's interest in all the tangible property of the partnership, and will thereby become a tenant in common with the other partners. This the plaintiff has done, and we are desired to restrain his execution, because it is alleged that he stands in the shoes of a partner, who would not have a right to molest the other partners until all accounts between them had been settled. But, if the other partners wish to take advantage of this circumstance, they ought to file a bill in equity against the vendee of the sheriff, or they may buy in the property when put up to sale. It has been said that the court of King's Bench would suspend the plaintiff's execution until he consented to an account being taken by the master: but I do not think we are authorized to take such a step in this case. Indeed, I can hardly conceive a case in which we should be authorized so to do." And CHAMBRE, J., says: "The law has determined what property the sheriff may take possession and dispose of under an execution; and we cannot erect ourselves into a court of equity for the purpose of taking accounts, without the consent of *the parties. The case of *Eddie v. Davidson* [*235 (which has been referred to in some of the cases) is essentially different: there, the application was made by the assignees of one partner to have a moiety of the produce of the goods taken in execution for a debt of the other partner, but no objection was made to the sale by the party applying, or to an account being taken by the master, by the party levying, though he denied the title of the insolvent partner to any of the goods. The short objection to this application is, that the court cannot direct a partnership account to be taken, without assuming a jurisdiction that does not belong to it." If, therefore, a court of

common law is not competent to take the accounts, and ascertain what is due to each partner, one cannot maintain an action for his share; for, *non constat*, that there may be anything due to him. The case of *Garbett v. Veale*, 5 Q. B. 408, seems to go the whole length of this argument. There, a *fi. fa.* was issued against one of two partners; and, whilst the sheriff was in possession, a *fiat* in bankruptcy issued against the firm. The sheriff, under an arrangement (the validity of which was afterwards questioned), allowed the messenger under the *fiat* to take possession of the goods; the messenger kept possession accordingly, and the goods were sold by the assignees, who received the proceeds. The execution-creditor sued them for money had and received: and it was held, that, even if the sheriff had sold the interest of the partner against whom execution issued, an account of the partnership liabilities must have been taken before such representative could have sued for money had and received; and therefore, that the execution-creditor had no right of action. "The son's interest," said Lord DENMAN, "could be only *236] in the surplus which might remain after payment of the *partnership debts; and that surplus must depend upon a settlement of accounts, which the court cannot take without the consent of the parties interested. If the sheriff had sold the son's interest, the vendee could have been only tenant in common of the proceeds with the assignees of the firm, and could not have maintained an action without a settlement of accounts." In *Smith v. Stokes*, 1 East, 363, after an act of bankruptcy committed by one of two partners, joint effects were sent away, which came to the defendant's hands; the solvent partner then died, leaving the defendant his executor; and afterwards a commission of bankruptcy was taken out against the surviving partner, and his estate assigned to the plaintiffs: it was held, that they were tenants in common with the solvent partner, and, after his decease, with his representatives, by relation of law from the act of bankruptcy; and therefore could not maintain trover against the defendant, claiming under such solvent partner. The practice now is, for the solvent partner to petition the court, to prevent the assignees from selling until the accounts are taken. (a) [MAULE, J. In the case of tenants or owners in common of a chattel, or of a joint bequest to two, may a creditor of one seize and sell the whole?] Yes. [MAULE, J. That seems very odd.] In Co. Litt. § 323, it is said—"If two be possessed of chattels personals in common, by divers titles, as, of a horse, an ox, or a cow, &c., if one take the whole to himself out of the possession of the other, the other hath no other remedy but to take this from him who hath done to him the wrong, to occupy in common, &c., when he can see his time." [MAULE, J. Then the vendee would not get a good title as against his co-tenant.] The sale passes no title. *237] *Trover is maintainable only where the plaintiff has the right of possession at the time. [V. WILLIAMS, J. In *Farrar v. Bes-*

wick, 1 M. & W. 682, Tyrwh. & Gr. 1053, PARKE, B., says: "I have always understood,—until the doubt was raised in *Barton v. Williams*, 5 B. & Ald. 395,(a)—that one joint-tenant or tenant in common of a chattel could not be guilty of a conversion by a sale of that chattel, unless it were sold in such a manner as to deprive his partner of his interest in it. A sale in market overt would have that effect." Here, all that is done, is, a sale of the goods not in market overt; and therefore the property did not pass. One of the leading cases upon this subject is *Holliday v. Camself*, 1 T. R. 658, where it was held that a member of an amicable society intrusted with a box containing the fund, and bound by bond to keep it safely, cannot maintain trover against another member and a third person who take it from him. ASHHURST, J., there says: "The rule of law,—that one tenant in common cannot maintain an action of trover against another,—is undoubtedly true, and applies to this case. All the members of this society have a joint property in the box and its contents: they are, therefore, tenants in common; and one tenant in common cannot maintain trover against another." *Barnardiston v. Chapman*, cited 4 East, 121,—which will probably be relied on by the other side,—is plainly distinguishable. There, the plaintiff was tenant in common of one moiety of a ship called the *Triton*, and the defendants tenants in common of the other moiety; and, the ship being in possession of the plaintiff, the defendants forcibly took it, and secreted it from him, and changed its name; and the ship afterwards came into possession of one Dean, who sent *it to Antigua, where the ship sunk, and was entirely lost. The jury found that this [*238 amounted to a wilful destruction of the ship by the defendants' means, and accordingly returned a verdict for the plaintiff, which the court afterwards refused to disturb.

Bramwell and *Willes*, in support of the rule. Beyond all doubt, the officer in this case was guilty of a conversion. The seizure and sale amount to a conversion, unless the sheriff justifies under the writ of execution. Not guilty and not possessed, do not put in issue more than was put in issue under the old plea of the general issue.

As to the second count, the proposition on the other side is, that the sheriff, under an execution against one having the smallest possible interest in the partnership property, may seize and sell the whole! [MAULE, J. The argument is, that the sheriff may sell, but he is guilty of no conversion, because the sale passes no title.] If the sale and delivery of property in which I have an interest, is a conversion, if done by a stranger, why is it the less so if done by one having an interest in a moiety of the thing sold? In the course of the argument in *Farrar v. Beswick*, PARKE, B., observes: "I have never entertained any doubt, since the case of *Barton v. Williams*, that a sale by one of two tenants in

(a) Affirmed on error, *Williams v. Barton*, 3 Bingh. 139; 10 J. B. Moore, 506; M'Clell. & Y. 406.

common of the whole of their property, is a conversion as to the share of the other." [V. WILLIAMS, J. There must be some mistake in the report.(a) That is not consistent with what he is afterwards made to say in the judgment. I think he must have meant,—“I should not have *239] *entertained a doubt, but for the case of *Barton v. Williams*,” &c.] In *Barton v. Williams*, A. and B. having agreed to purchase cottons on their joint account, directed their brokers to purchase the same: these purchases having been made, warrants or orders for delivery were made out in the name of the brokers, and the cottons were left in their possession as the brokers of A.: immediately after the purchase, B. paid A. one-half the value: after considerable purchases had been made, the brokers were informed that B. had an interest in the goods purchased: A., after this, directed the brokers to procure him a loan on the security of the warrants, and C. advanced money by discounting bills drawn by A. upon the brokers, as a security for which the whole of the warrants were deposited with C. by the brokers; while they were so deposited, the brokers received instructions both from A. and B. to make a division of the goods held on their joint account, which they did, by appropriating specific warrants to each party, and which division was approved of by both. Before the bills became due, the brokers were directed by A. to get one-half renewed, which C. agreed to do, and discounted fresh bills; and the brokers then left in the hands of C., as a security for the money thus advanced, the warrants belonging to B.; C., however, not then knowing that B. had any interest in them. It was held,—first, that the first pledge did not transfer to C. any interest in that part of the goods which belonged to B.; secondly, that, after the partition had taken place, the tenancy in common, if it ever had existed, was determined, and, that being so, the second pledge was the pledge of a specific chattel belonging to B., which the brokers had no authority to make; and that trover was maintainable. “It has been said,” observes ABBOTT, C. J., “that trover cannot be maintained, because there was no *240] conversion, on the *ground that, at the time of the original pledge, the plaintiffs were tenants in common with Moore, who was the owner of an undivided moiety. It is laid down by Lord Chief Baron COMYNS,(b) that, if a bailee sells the goods of another, the very act of sale on his part is such a conversion as to entitle the owner to maintain trover; and if that be so, it follows, that, if a bailee, in possession of undivided shares belonging to two persons, sells the whole, it must be a conversion as to the undivided part belonging to one, over which he has no right or title whatever. I incline to think, therefore, upon that ground, that the pledge could not operate upon the property of the plaintiffs; and that even if there had been no partition, the sale was a conversion of

(a) The following *erratum* was subsequently in Vol. II. published—“*dele have, and for since read before;*” and the original leaf was cancelled, and a corrected one substituted for it, when the volume was completed. And see the observation of PARKE, B., as reported in *Tyrwh. & Gr.* 1956

(b) *Com. Dig. Action upon the case upon Trover*, (E.); citing 2 Salk. 655.

the undivided interest, and therefore that trover may be maintainable." And BAYLEY, J., said: "There may be cases in which the indivisible nature of the subject-matter of the tenancy in common may raise an implied authority in one to sell the whole. But, unless there be such authority, either express or implied, a sale of the whole by one tenant in common, is, with respect to the other, a wrongful conversion of his undivided part." PARKE, B., evidently considers that case an authority that a sale out and out of the whole partnership property would be a conversion *quoad* the solvent partner. Two persons jointly interested in a chattel, may maintain separate actions of trover in respect of it against a person who unjustly detains it: *Bleaden v. Hancock*. (a) In *Fennings v. Lord Grenville*, 1 Taunt. 241, it was held that one tenant in common of a chattel cannot maintain trover for it against his companion, unless the latter have so disposed of it as to render it impossible that the plaintiff should ever take and use it. Here the *goods are as entirely placed beyond the power and control of the plaintiff, as if they had been wholly destroyed, or as the ship [*241 was, in *Barnardiston v. Chapman*. In *Jacky v. Butler*, 2 Lord Raym. 871, judgment was entered against one of two partners in trade; and, upon a *fi. fa.*, all the goods, being undivided, were seized in execution: upon application to the King's Bench by him against whom the execution was not, the court held that the sheriff could not sell more than a moiety, for, the property of the other moiety was not affected by the judgment, nor by the execution. In *Smith v. Stokes*, 1 East, 363, Lord KENYON says: "I do not understand how the assignees of the bankrupt could take the whole legal interest in this case, without which it is admitted that the action is not maintainable against the defendant. If, indeed, property be left in the hands of a bankrupt partner at the time of the bankruptcy, the assignees are entitled to take possession of the whole and sell it; but they must account for a moiety to the other partner. As in the case of *Heydon v. Heydon*, 1 Salk. 392, where it was holden, that, under an execution against one of two co-partners, the sheriff must seize all, and not merely a moiety of the goods sufficient to cover the debt; because the moieties are undivided; and he must sell a moiety thereof undivided, and the vendee will be tenant in common with the partner." [CRESSWELL, J. In *Farrar v. Beswick*, PARKE, B., says: "As at present advised, though it is not necessary to give a conclusive opinion, I think, that, if the plea had stated that Joshua had a joint interest in these cattle, and that the sheriff seized and sold the whole goods to levy the execution, it would have been a good answer to this action." Do you contest that proposition?] I do. There *are numerous cases to show that the sheriff has no right to sell more than the undivided [*242 moiety of the debtor. The authorities upon this subject are thus summed up in Archbold's Practice: (b) "Under a *fi. fa.* against one of two

(a) 4 C. & P. 152. There was no plea in abatement.

(b) 8th edit., by Chitty, p. 583.

partners, the sheriff may seize the goods of both, (a) and sell the defendant's undivided moiety (b) in them; in which case, the vendee will, it is said, be tenant in common with the other partner. (c) The seizure does not divest the other partner of his property or possession in the goods seized; (d) therefore, when the sheriff enters and takes possession of partnership property, he seizes in execution only the interest of the defendant in the goods; (d) and so, if, after he has seized under a writ of *fi. fa.* against one partner, a second writ of *fi. fa.* be delivered to him against both partners, he cannot be considered to have seized under it, until he has actually done so. (d) And so, if the sheriff, after seizing the joint effects of two partners for the separate debt of one, should receive a *fi. fa.* requiring him to levy for the separate debt of the other, he cannot return *nulla bona* to the second writ, without rendering himself liable to an action for a false return. (d) There appears to be much doubt as to what interest in the partnership property can be sold by the sheriff. (e) In a recent case, Lord DENMAN, C. J., said, *243] 'that he must sell such legal interest or share as the defendant has, as partner (which, in the case of only two co-partners, would be an undivided share), not the degree of right which he may be found to have on a winding-up of the affairs; because, if the plaintiff waited till that could be ascertained, the goods might remain unsold for an indefinite time: he must, however inconvenient it may be, sell the share of the defendant partner, make the purchaser tenant in common with the other partner, and the purchaser must do the best he can to ascertain what interest there is. (g) And, in another more recent case, the same learned judge said, 'The interest of one of several partners in the partnership property applicable to an execution against him, is only the surplus after payment of the partnership debts, and must depend upon a settlement of accounts, which a court of law is not competent to take, except by consent of all parties.' (h) Where an execution issued against one of two partners for a separate debt, under which the goods of the partnership were seized; before the sale, a *fiat* in bankruptcy issued against the partnership; the partnership property was afterwards sold, and the produce received by the assignees: it was held that the execution-creditor could not maintain an action against the assignees for a moiety of the produce, as money had and received to his use, having

(a) Citing *Johnson v. Evans*, 7 M. & G. 240, 7 Scott, N. R. 1035, 1 D. & L. 935; *Farrar v. Beswick*, 1 M. & W. 682.

(b) Citing *Johnson v. Evans*, and *Jacky v. Butler*, 2 Ld. Raym. 871.

(c) Citing *Eddie v. Davidson*, 2 Dougl. 650; *Pope v. Hayman*, Comb. 217; *Heydon v. Heydon*, 1 Salk. 392. And see *Morley v. Strombom*, 3 B. & P. 254, 288; *Bachurst v. Clinkard*, 1 Show. 169; *Garbett v. Veale*, 5 Q. B. 408; *Johnson v. Evans*, 7 M. & G. 240, 7 Scott N. R. 1035, 1 D. & L. 935; *Dutton v. Morrison*, 17 Ves. 193; *Taylor v. Fields*, 4 Ves. 396; *Tidd's Practice*, 9th edit., p. 1807.

(d) Citing *Johnson v. Evans*.

(e) See *Burton v. Green*, 3 C. & P. 306, and the note there.

(g) Citing *Holmes v. Mentze*, 4 Ad. & E. 131.

(h) Citing *Garbett v. Veale*, 5 Q. B. 408; *Heydon v. Heydon*, 1 Salk. 392; *Chapman v. K Jopa*, 3 B. & P. 289. And see *dictum per PATTERSON*, in *Burnell v. Hunt*, 5 Jurist, 650.

acquired no legal interest in the goods.(a) The proper course seems to be, to buy the defendant's share, and file a bill in equity for an account." [V. WILLIAMS, J., referred to *Graves v. Sawcer*, Sir T. Raym. 15, "in an action upon the case, the *plaintiff declares that he was owner of a sixteenth part of a ship, and the defendant was owner of [*244 another sixteenth part of the same ship, and that the defendant fraudulently and deceitfully carried the said ship *ad loca transmarina*, and disposed of her to his own use, by which the plaintiff hath lost his said sixteenth part: on not guilty pleaded, and verdict for the plaintiff, it was moved, in arrest of judgment, that this action doth not lie; for, although it was found to be deceptive, yet this does not help it, if the action doth not lie on the subject-matter; and here they are tenants in common of the ship; and LITTLETON saith, that between tenants in common there is not any remedy; and there cannot be any fraud between tenants in common, because the law supposes a trust and confidence betwixt them; and upon these reasons, judgment was given *quod querens nil capiat per billam*."(b) MAULE, J. All that appears there, is, that the ship was made use of as a ship.] It may be conceded that the seizure and sale alone would not amount to a conversion. It is the delivery of the goods to the vendee, and thereby putting them out of the power and control of the solvent partner, that constitutes the conversion. This matter was very much considered in *Higgins v. Thomas*, 8 Q. B. 908. The plaintiff is clearly entitled to a verdict on the second count, for a moiety of the value of the goods.

- *Bramwell* and *Willes* then proceeded to show cause against the rule obtained on the part of the defendant. Besides the partnership property, it appeared, that, at the time of the seizure, there were brewing utensils and casks upon the premises, which were the separate property of Mayhew. These,—which were valued by the *jury at 15*l*. 15*s*.,—it was contended, on the part of the defendant, having [*245 been used for the purpose of the business, were to be considered and treated as property belonging to the firm. But there was no evidence that they had ever been transferred to the firm: and the partnership agreement, which was put in, was altogether silent upon the subject. There is no pretence, therefore, for saying that they ever ceased to be the property of Mayhew. The partnership might have been put an end to at any moment, at the option of either partner: there was, therefore, no reason why the plant should be made joint property.

Lush, in support of his rule. The question is, whether these casks and utensils, which had formerly belonged to Mayhew, did not, by the way in which they had been dealt with by the parties, become partnership property. If they did, upon the construction of the agreement, there must be a nonsuit: or, if the question should have been submitted

(a) *Olling Garbett v. Veale*, *ubi supra*.

(b) *Vide* M. 11 H. 4, fo. 13, a. pl. 29; *Crosse v. Abbot*, Noy, 14.

to the jury, there must be a new trial. Beside these casks, there was a quantity of malt and hops upon the premises at the time Smee became a partner; and these were consumed in the business, and no claim is now made in that respect. In Collyer on Partnership, 2d edit. 105, it is said: "When the respective shares of the partners in the stock and capital are to be ascertained—a necessity usually arising on a dissolution,—it will be essential, in the first place, to know in what manner the respective *interests* of the partners are distributed, either by virtue of their own agreement, or by operation of law. This will not be difficult, where one partner has brought to the joint concern real property, the other personal property; or, where both have provided stock of the same *246] *specie*, the other capital. And, in all these cases, where it does not appear what is the precise amount of the respective shares of the partners, the presumption is that they are entitled equally.(a) But, suppose one partner to have contributed labour only, sharing the profits; would he, in default of partnership articles, be adjudged a partner in the original capital? In all doubtful cases, this question must be answered by a jury; and their verdict must depend upon whether they think with the civilians, *operam pro pecuniâ valere*." [COLTMAN, J. There was no evidence whatever upon which the jury could have come to the conclusion that the casks and plant ever became the property of the partnership; and, in the absence of any stipulation to that effect in the agreement, the evidence must be very strong indeed. There is a great difference between articles of this description, and goods, such as malt and hops, *quæ ipso usu consumuntur*.]

COLTMAN, J. It is quite clear that the plaintiffs in this case are entitled to a verdict for 15*l.* 15*s.* upon the first count.

As to whether the plaintiff can maintain trover against the officer for the sale of his share of the partnership effects,—it is conceded that the case of a sheriff is not distinguishable from that of any other joint owner of a chattel: and, that being so, the authorities are too strong to be got over, that the mere sale of a chattel by one of two joint owners, is not a conversion as against the other. It is not necessary, however, to decide that point here. There may be such a dealing with the chattel by one *247] of the joint owners, **short of its absolute destruction, as would* amount in law to a conversion. But there is nothing here to show that the defendant has so conducted himself as to put it out of the power of the plaintiff to take his property, or to pursue his remedy against the parties who have got possession of it. The real question, however, is, whether that defence can be gone into upon not guilty. My opinion, notwithstanding the case of *Stancliffe v. Hardwick*, 2 C. M. & R. 1,—which, it seems, is not now upheld,(b)—is, that it was competent to the defendant,

(a) *Farrar v. Beawick*, 1 M. & W. 682; *Peacock v. Peacock*, 2 Campb. 45, 16 Ves. 56.

(b) See the observations of PARKE, B., upon that case, in *Whitmore v. Greene*, 13 M. & W. 107, and *Kynaston v. Crouch*, 14 M. & W. 272.

under not guilty, to show that he had not been guilty of a *wrongful* conversion.

As to the second count, however, it seems to me that the facts as alleged are established, and that the plaintiffs are entitled to a verdict upon that count. And I do not see any other measure of damages than the half. We can only pay regard to the legal rights of the parties. Until the contrary is shown, the presumption, in the case of partners, is, that each is interested in the partnership goods to the extent of one half. The plaintiffs, therefore, will have a verdict entered upon the second count for 75*l*.

MAULE, J. I agree with my brother COLTMAN in thinking that the plaintiffs are entitled to a verdict upon the first count for 15*l*. 15*s*., and upon the second count for 75*l*. Notwithstanding the section of Littleton that has been referred to, I am strongly inclined to think that trover may be maintained under circumstances like these. That doctrine, as it seems to me, is to be understood thus,—that there may be dispositions of the subject-matter which will amount to a *conversion if done by a stranger, that are not so if done by a tenant in common. But I [*248 do not think it therefore follows, that no dealing with the thing by one of two tenants in common, that does not amount to a total annihilation of it (if that be possible), can be a conversion as against his co-tenant. It may be that the co-tenant may, if he think fit, follow the thing, and make title to it, notwithstanding its sale and delivery to a third person. But it does not follow, that, where one tenant in common has dealt with the subject to an extent exceeding his authority,—as, where he sells out and out to a number of purchasers, who carry away the articles,—it would militate against the true understanding of the older authorities to hold that the party may treat that as a conversion. It is not, however, necessary to decide that upon the present occasion.

The second count was distinctly proved, and the plaintiffs are clearly entitled to a verdict on it. The question is, to what amount of damages are they entitled. Until the contrary be shown, partners are to be assumed to be entitled in equal shares. The proper measure of damages, is, the amount of interest which Mayhew lost by the sale. And, in the absence of any evidence to cut down his claim, we must assume that he was interested to the extent of a moiety.

CRESSWELL, J. I am of the same opinion. Upon the first point, the authorities seem to show that one partner or joint-tenant of a chattel cannot maintain trover against his co-tenant in consequence of his having taken upon himself to sell the subject-matter of the joint-ownership. And there is no distinction in this respect between the case of the sheriff and any other tenant in common. If, however, the thing be destroyed, or sold so as to change the property, as, in market overt, the case *is [*249 different. So, here, if the plaintiffs could have shown that the goods were so disposed of as to prevent him from following his legal rights, he might have been entitled to maintain trover. In the case of Barnar-

diston v. Chapman,—cited in 4 East, 121, from a MS. note of Lord Chief Justice KING,—the court lay it down broadly, that, where one tenant in common does not destroy the thing in common, but only takes it out of the possession of the others, and carries it away, trover will not lie. But, upon the second trial, it appeared that the plaintiff was tenant in common of one moiety of the ship called the Triton, and the defendants tenants in common of the other moiety; that, the ship being in the possession of the plaintiff, the defendants forcibly took it out of his possession, and secreted it from him, so that he knew not where it was carried, and changed the name of the ship, which afterwards came into the possession of one Dean, who sent her to Antigua, where she was entirely lost. The plaintiff's counsel insisted that the thing in common being thus destroyed, the defendants were to answer for it to the plaintiff. But the defendants' counsel insisted that one tenant in common is only answerable to the other tenant in common for an actual destruction; to which KING, C. J., agreed; but left it to the jury, upon the whole circumstances of the case, "whether, by the defendants' force, the ship was actually taken from the plaintiff, and secreted, and carried out of his power to preserve the ship? and, a destruction happening in those circumstances, —whether it should not be found to be a destruction by the defendants' means?" which the jury accordingly found, and gave the plaintiff 110*l.* damages. And the court unanimously agreed to the chief justice's direction, and refused to grant a new trial. It may be, as a sale in market overt is equivalent to a destruction of the thing so far as the rights of a co-tenant are *concerned, that that decision is sustainable on that *250] ground: but I do not think the court meant to put it on any such footing. The property may be so entirely changed by other means than destruction or sale in market overt, as to give a right of action.

A denial of the conversion may be given in evidence under not guilty. As to the case of *Stancliffe v. Hardwick*, I should not have felt inclined to say that it was not law, unless the judges who decided it had themselves said so.

The second count, I think, was sustained by the evidence: and, in the absence of anything to show that the bankrupt was entitled to less than a moiety of the partnership effects, that must be the measure of damages the assignees are entitled to recover.

V. WILLIAMS, J. I also am of opinion that the damages should be increased on the second count, but not upon the first. Notwithstanding the doubt thrown upon the case of *Barton v. Williams* by Mr. Baron PARKE, in *Farrar v. Beswick*, I think the true rule is, that the sale of a chattel by one of two joint-tenants is not a conversion, unless it operates altogether to deprive his companion of his property in it. It is not necessary for us to decide whether *Stancliffe v. Hardwick* is good law or not; though, after the observations made upon it by one of the judges who decided it, in *Whitmore v. Greene* and *Kynaston v. Crouch*, I think it

cannot be sustained. (a) The verdict upon the first count, therefore, will be limited to the 15*l.* 15*s.*, the value of Mayhew's separate property.

The second count was proved. Whether it was good or not, is not the question now before us. In the absence of anything to show Mayhew entitled to less than *a moiety of the value of the partnership property, that must be the measure of damages. [*251

Plaintiffs' rule to increase the damages, absolute, as to the second count. Defendant's rule discharged.

(a) And see *Higgins v. Thomas*, 8 Q. B. 908.

TURNER v. MERYWEATHER. Feb. 9.

A count in an action for a libel, stated that the defendant,—intending to cause it to be believed that the plaintiff and one J. H. had transferred, or caused to be transferred, a certain amount of Bank-stock from the name of one W. T., by means of a power of attorney obtained by them from W. T. by undue influence, at a time when he was mentally incompetent to do any act requiring reason and understanding,—published the following, "There is strong reason for believing that a considerable sum of money was transferred from Mr. T.'s (meaning the said W. T.'s) name in the books of the Bank of England, by power of attorney obtained from him by undue influence after he became mentally incompetent to perform any act requiring reason and understanding (thereby meaning that the plaintiff and J. H. had transferred, or caused to be transferred, the said money from the said W. T.'s name in the said books of the said bank, by means of a power of attorney obtained by them from the said W. T. by undue influence exercised by them over the said W. T., and at a time when the said W. T. had become and was mentally incompetent to give a power of attorney and to perform any act requiring reason and understanding.")

The jury having found a general verdict for the plaintiff:—Held, on motion in arrest of judgment, that the count was good, and that the innuendo did not improperly extend the meaning of the libel.

It is in the discretion of the judge at nisi prius to refuse or to allow a postponement of a trial, the ground of the absence of a witness.

THIS was an action upon the case for a libel. The declaration consisted of eight counts.

The first count, after the common inducement, stated, that, theretofore, and long before the committing by the defendant of the said several grievances, one William Turner, late of Wodecote Lodge, in the county of Surrey, since deceased, had signed a draft will as and for instructions for the preparation by his attorney of the last will and testament of him the said William Turner; *that the said William Turner was, at the time he so signed such draft will, of perfectly sound and disposing mind, memory, and understanding, and knew and fully understood the nature and contents thereof: that one Mary Ann Meryweather was the only child and heiress-at-law of the said William Turner at the time of his death; yet that the defendant, well knowing the premises, but wickedly and maliciously contriving and intending to injure the plaintiff, and to bring him into public scandal, infamy, and disgrace, and to cause it to be suspected and believed that the plaintiff had fraudulently and corruptly caused and procured the said William Turner to sign the said

draft will at a time when he the said William Turner was in an imbecile state of mind, and incapable of understanding the nature and effect thereof, and that the motive of the plaintiff, in procuring such signature, was, to prevent the said heiress-at-law of the said William Turner from succeeding to his property, theretofore, to wit, on, &c., falsely, wickedly, and maliciously did compose, print, and publish, and caused to be composed, printed, and published, in one part of a certain pamphlet, intituled "Extraordinary case in the Ecclesiastical court, by a Barrister-at-law," the false, scandalous, malicious, defamatory, and libellous matters thereinafter next mentioned, of and concerning the said draft will, and of and concerning the said William Turner, and of and concerning the state of mind of the said William Turner, and his capacity to understand the nature and contents of the said draft will at the time when he so signed the same, and of and concerning the said heiress of the said William Turner, that is to say, &c., &c.

The seventh count stated, that also, before the time of the committing by the defendant of the grievances thereafter next mentioned, and for a long time prior to, and at the time of, the death of the said William *253] *Turner, a large sum of money, to wit, the sum of 10,000*l.*, had been and was standing in the books of the governor and company of the Bank of England in the name of the said William Turner; that the defendant, further contriving and intending wickedly and maliciously to injure the plaintiff, and to bring him into public scandal, infamy, and disgrace, and to cause it to be suspected and believed that the plaintiff and the said John Hornblow Turner had transferred, or caused to be transferred, the said money from the said William Turner's name in the said books, by means of a power of attorney obtained by them from the said William Turner by undue influence, at a time when the said William Turner had become and was mentally incompetent to give a power of attorney, and to perform any act requiring reason and understanding, theretofore, to wit, on the 23d of May, 1846, falsely, wickedly, and maliciously did compose, print, and publish, and cause to be composed, printed, and published, in another part of the said pamphlet in the said first count mentioned, the false, scandalous, malicious, defamatory, and libellous matters thereafter next mentioned, of and concerning the plaintiff, and of and concerning the said money so standing in the books of the Bank of England in the name of the said William Turner as aforesaid, that is to say—"Yet, in defiance of all the watching, there is strong reason for believing that a very considerable sum of money was transferred from Mr. Turner's (meaning the said William Turner's) name in the books of the Bank of England, by power of attorney obtained from him by undue influence, after he became wholly incompetent to perform any act requiring reason and understanding (thereby meaning that the said plaintiff and the said John Hornblow Turner had transferred, or caused to be transferred the said money from the said William Turner's name in the said books of the said

*bank, by means of a power of attorney obtained by them from the said William Turner by undue influence exercised by them [*254 over the said William Turner, and at a time when the said William Turner had become and was mentally incompetent to give a power of attorney, and to perform any act requiring reason and understanding)," &c. &c.

The defendant pleaded not guilty, and several pleas of justification, which are not now material.

The cause was tried before Lord DENMAN, C. J., at the last spring assizes for the county of Surrey. The first seven counts of the declaration were for libellous matter published by the defendant in a pamphlet, reflecting very seriously upon the character of the plaintiff. It appeared that William Turner, mentioned in the declaration, was the brother of the plaintiff, and the father of the defendant's wife; that William Turner made a will on the 16th of May, 1829, and a codicil thereto on the 29th of August; and that he died on the 19th of September in that year.

At the time of making his will, William Turner was about eighty years of age, and in a very infirm state of health. Robinson, his attorney, it appeared, had got him to sign the draft before the will was formally executed. Shortly after William Turner's death, the defendant entered a *caveat*, and opposed the grant of probate, and afterwards commenced proceedings in equity, and brought two ejectments, for the purpose of trying the validity of the will; but none of these proceedings were followed up. The principal charges contained in the pamphlet, were, that the plaintiff and others in concert with him, had caused the will and codicil to be executed by the testator when in an unsound state of mind; and that, whilst he was in such state of mental incapacity, they had induced him to sign a power of attorney, under which there was *reason to believe that a large amount of stock had been sold [*255 out.

The cause having been specially appointed to be tried on Monday, the 3d of April, the defendant, on Saturday, the 1st of April, applied to PARKE, B., at chambers, for leave to examine one Dr. Harris, a medical man who had attended William Turner down to the time of his death, before a commission at Reading (he being unable to attend at the trial, by reason of illness), and that such examination might be read as evidence for the defendant on the trial; or why the trial should not be postponed. Upon the hearing of the summons, at 1 o'clock on that day, the learned baron made an order that the defendant might be at liberty to examine Dr. Harris *visà voce* as to any matters to which he had not been interrogated on his examination in a suit in chancery, in 1835, touching the will in question,—on condition, that, if the defendant should read the examination, he should also read the deposition of the witness in chancery, and should also admit the deposition of Robinson (deceased),

the attorney of the testator, taken at the same time, to be read for the plaintiff.

On the morning of Monday, the 3d of April, application was made to Lord DENMAN to postpone the trial, on the ground of the absence of Dr. Harris. The order of PARKE, B., had not been acted upon. Lord DENMAN declined to postpone the trial; and, in the result, a general verdict was found for the plaintiff, damages 1000*l*.

Channell, Serjt., in Easter term last, moved for a rule to show cause why there should not be a new trial, on the ground of the trial having been improperly allowed to take place in the absence of Dr. Harris, and also on the ground that the damages were excessive; or why the judgment should not be arrested on the *seventh count, and a *venire* *256] *de novo* awarded, to try the issues joined upon the other counts, on the ground that the seventh count was bad, the innuendo therein unduly extending the meaning of the libel.

WILDE, C. J. Looking at the nature of the imputations cast upon the plaintiff by the publication in question, and having no certain test for ascertaining the precise measure of damages in such a case, I cannot say that the sum awarded is excessive. As to the refusal of Lord DENMAN to postpone the trial, that is a matter that is attended with some difficulty: the affidavits do not show that the defendant has sustained any prejudice from the course that was adopted. Upon this point, however, as well as upon the motion in arrest of judgment, we will take time to consider. There certainly seems to be a little ambiguity in the seventh count.

On the following day, the court intimated that the rule might go upon the two points which had been reserved for consideration.

Shee, Serjt., *R. Gurney*, and *Fish*, now showed cause. It was entirely in the discretion of the learned judge to postpone the trial: and, if it were necessary to consider it, that discretion was well exercised upon the facts of this case. The defendant had ample time to act upon the order of PARKE, B., if he had been minded so to do.

It is said that the seventh count is bad, for that the innuendo unduly extends the meaning of the words of the libel. There can be no doubt that the publication is in itself libellous. [MAULE, J. The objection is, that the innuendo asserts, as a fact, that the plaintiff and John Hornblow *257] Turner had improperly procured the *money to be transferred; whereas the libel itself merely states that "there was strong reason for believing" that they had done so.] It was for the jury to say what was the meaning of the party using the words,—whether he did not intend to impute fraud to the plaintiff, under the mask of caution. In Comyns's Digest, Title *Action upon the Case for Defamation* (E. 1.), it is laid down, that "if words are slanderous, it is not material though they are spoken indirectly and obliquely: as, *I will make thee an example for a perjured knave.*" ⁿ Peake v. Oldham, in error, Cowp. 275, in slander, in which the plain-

tiff below (Oldham) declared, that, upon a colloquium of and concerning the death of one Daniel Dolly, Poake (the defendant below) said to Oldham,—“You are a bad man, and I am *thoroughly convinced* that you are guilty (meaning, guilty of the murder of the said Dolly), and, rather than you should want a hangman, I would be your executioner:” and these words were held actionable. Lord MANSFIELD there says: “Where it is clear that the words are *defectively* laid, a verdict will not cure them. But, where, from their general import, they appear to have been spoken with a view to defame a party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptation and meaning of them.” So, in *Roberts v. Camden*, 9 East, 93, it is laid down, that the rule of construction as to slanderous words, is, to construe them in their plain and popular sense, that in which an ordinary hearer would have understood them at the time they were spoken: and, therefore, the defendant saying of the plaintiff that “he was *under a charge of prosecution for perjury*; and that G. W. (an attorney of that name) had the Attorney-General’s directions to prosecute the plaintiff *for perjury*,” is actionable: for, after verdict *—by which the jury, who are to judge of the intent of the speaker, must be taken to have *negatived* that he meant to speak [*258 of a prosecution for, a perjury which the plaintiff had *not* committed,—the words, not having been justified, must be taken to be *false*; and, being unqualified by any context, and unexplained by any occasion to warrant them, the law infers *malice* from the *falsehood* of an accusation which, in the common acceptation of the words, imputes *perjury* to the plaintiff. In *The Earl of Northampton’s case*, 12 Co. Rep. 132, it was resolved, “that, if A. say to B. *did you not hear that C. is guilty of treason?* &c., this is tantamount to a scandalous publication.” So, in *Bac. Abr. Slander* (G.), pl. 2, it is said: “An action lies for publishing these words of J. S., *I think, or I dreamed, he committed a certain felony*; for, although the words are not directly affirmative, J. S. may by reason of the words be arrested, upon suspicion of having committed that felony.” [V. WILLIAMS, J., referred to *Boydell v. Jones*, 4 M. & W. 446, where the words were spoken ironically.] It is enough, after verdict, if the words *can* have the meaning imputed to them. In *Gardiner v. Williams*, 2 C. M. & R. 78, 5 Tyrwh. 757,(a) one of the counts set forth the following libel, addressed in a letter to one C. A. P.—“I (meaning the defendant) have reason to suppose that many of the flowers of which I (meaning the defendant) have been robbed, are growing upon your premises (thereby meaning that the plaintiff had been guilty of larceny, and had stolen from the defendant certain plants, roots, and flowers of the defendant, and had disposed of them unlawfully to C. A. P., and unlawfully placed them in the garden of the last-mentioned person):” and the count was held good, on motion in arrest of judgment,

(a) Affirmed, on error; *Williams v. Gardiner*, 1 M. & W. 245, Tyrwh. & Gr. 158.

*259] on the ground that *"flowers" could be the subject of larceny, and that the innuendo was not too large; Lord ABINGER, C. B., observing, that "any assignable case which will support the verdict must be presumed."(a)

The first seven counts are, in substance and legal effect, one. In *Alfred v. Farlow*, 8 Q. B. 854, a declaration for slander recited that the plaintiff carried on the trade of buying and selling, and was a dealer in an article of fishing-tackle, called a winch; and that the defendant used the trade of making and selling winches; and it charged that the defendant, intending to injure the plaintiff in his said trade, and to cause his customers to believe that he was guilty of unlawfully buying goods, well knowing them to have been stolen and dishonestly come by, in a discourse which he had with the plaintiff, of and concerning him, with reference to his said trade, and of and concerning the premises, in the presence and hearing of J. F., &c., falsely and maliciously spoke to and of and concerning the plaintiff, and of and concerning him with reference to his said trade and the premises, the words, &c., "I (meaning the defendant) have been robbed of about three dozen winches (meaning such articles, &c.): a person has been buying things at my shop, and has taken them: you (meaning the plaintiff) have bought two, one at 3s., and one at 2s.: you (meaning the plaintiff) knew well, when you bought them (meaning the said winches), that they cost me (meaning the defendant) three times as much making, as you (meaning the plaintiff) gave for them, and that they could not have been come honestly by." The declaration then proceeded—"whereupon the plaintiff then, in the presence and hearing of the aforesaid persons, said to the defendant," &c., *260] setting forth further words of the *plaintiff respecting winches, and alleging that the defendant, further contriving, &c., thereupon, in the presence and hearing of the said persons, replied, &c. (setting out other words); "thereby meaning," &c., "that the plaintiff had been and was guilty of buying winches, well knowing the same to have been dishonestly come by, and to have been feloniously stolen, by the person of and from whom the said plaintiff had so bought them." After verdict for the plaintiff, with general damages,—it was held, on motion in arrest of judgment, first, that the words first set out, imputed that the plaintiff had received stolen goods, knowing them to have been stolen; secondly, that the words following appeared to have been spoken at the same time with the others, and formed with them a continued discourse; that the declaration, therefore, contained only a single count; and, consequently, that the plaintiff was entitled to judgment, even on the assumption that the words last set out gave no cause of action. The same doctrine is laid down in *Griffiths v. Lewis*, 8 Q. B. 841. And both these cases are founded upon *Hambleton v. Vere*, 2 Saund. 169. Hughes

v. Rees, 4 M. & W. 204, puts libel and slander upon the same footing in this respect.

Pearson and Henniker, in support of the rule. This is, of all others, a case in which the evidence of the medical attendant would be important; and therefore justice required that the defendant should not have been forced to trial in the absence of Dr. Harris.

Reading the seventh count by itself, there is nothing libellous in it, nor anything to apply it in an offensive sense to the plaintiff. When some counts in a declaration for libel or slander are good and some bad in law, and general damages are given, the court will *arrest the judgment in *toto*, and will not award a *venire de novo*: *Holt v. Scholefield*, 6 [*261 T. R. 691. In *Comyns's Digest*, Title *Action upon the Case for Defamation* (F. 14), it is said, that, "if words charge no person certain; as, *one of my brothers is*, &c., where he had several brothers, no action lies. So, if he say to three witnesses, *one of you is perjured*, none of them shall have an action." So, "if he say *my enemy is*, &c., no one shall have an action. *The Boxes are traitors*, none of that name shall have an action. She had a child, and she, or *somebody else*, made it away." In *Hall v. Blandy*, 1 Y. & J. 480, it is laid down, that, where that which is complained of in the declaration as a libel, does not, upon the face of it, apply to the plaintiff, and import a libel, it is necessary by inducement to state such facts as will support an innuendo, and show the libellous application of the statement to the plaintiff. In *Forbes v. King*, 1 Dowl. P. C. 672, a count in an action for a libel charging that the defendant wrote of the plaintiff that he was a "man Friday" to another, was held bad, for want of an averment to show that, by the term Friday, as applied to the plaintiff, degradation and subserviency were intended to be imputed to him: so, to write of a man, that he has been engaged in a gambling fracas, arising out of a dispute at play, is not libellous, without an averment that illegal gambling and play were intended by the libel. In *Solomon v. Lawson*, 8 Q. B. 823, it was held, that, in an action for libel or slander, where the words written or spoken are not in themselves applicable to the individual plaintiff, no introductory averment or innuendo can give them such an application. In *Empson v. Griffin*, 11 Ad. & E. 186, 3 P. & D. 160, where one of several counts in a declaration for slander was bad, and *some of the *defamatory* [*262 words in it were proved at the trial, and the jury found a general verdict with damages for the plaintiff, the court set aside an order of the judge who tried the cause, to confine the verdict and damages to the good counts. The office of the innuendo is thus explained in *Williams's Saunders*: (a) "An innuendo is only explanatory of some matter already expressed; it serves to point out where there is precedent matter, but never for a new charge; it may apply

(a) Vol. I. p. 243, n. (4); citing *Rex v. Greepe*, 2 Salk. 513, 1 Ld Raym. 256, 12 Mod. 139.

what is already expressed, but cannot add to, or enlarge, or change the sense of previous words." Again: (a) "The principle that an innuendo which introduces a meaning broader than that which the words naturally bear, is bad, as being too large, unless connected with proper introductory averments, has been supported by numerous modern decisions." (b) Ambiguous words are not helped by a verdict: *Hughes v. Rees*, 4 M. & W. 204. This is not like the case of *Griffiths v. Lewis*, where the whole was one continuous statement. In *Solomon v. Lawson*, 8 Q. B. 823, it was held, that in an action for libel or slander, when the words, written or spoken, are not in themselves applicable to the individual plaintiff, no introductory averment or innuendo can give such an application. Therefore, where the declaration, in the first count,—after reciting that the plaintiff was employed in supplying fresh water to ships at St. Helena, and had, for that purpose, fitted up a schooner with wooden tanks, and that, the ship *Moffat* being at St. Helena, the plaintiff *263] conveyed fresh *water to her in the wooden tanks of his schooner, —complained that the defendant published, of and concerning the plaintiff in his said employment, and concerning the water so supplied to the *Moffat*, a statement (set forth in the count) that persons on board the *Moffat* had become ill soon after leaving St. Helena, where they had taken in fresh water; which illness was occasioned by the water; that the water was run into a copper tank, whence the casks were filled alongside; that the poison was imbibed from the tank; and that it behoved the authorities to order its removal, and replace it with an iron one,—thereby meaning that the plaintiff had been guilty of supplying bad and unwholesome water to the *Moffat*,—the court arrested the judgment. In giving judgment, Lord DENMAN says: "If there be contained in the alleged libel, matter which is capable of receiving the interpretation put upon it by the innuendo, there is no fault in the count for not having explanatory averments to fix and point the libel. But, generally, if the words written or spoken cannot apply to the individual plaintiff, no previous averments or subsequent innuendos can help to give the words on application which they have not. And that is the reason why the words must be set out, as was observed by Lord ABINGER, in giving the judgment of the court in the case of *Gutsole v. Mathers*, 1 M. & W. 495, Tyrwh. & Gr. 694."

COLTMAN, J. We must consider in this case what is due in justice, not only to the defendant, but also to the plaintiff. The defendant did not avail himself of the order of my brother PARKE. If there was not time for the purpose, that might have been shown by affidavit. When at the assizes, the defendant sought to have the trial postponed, not for

(a) Vol. I. p. 243 a, n. (2).

(b) The following cases are cited—*Goldswein v. Foss*, 6 B. & C. 154, 9 D. & R. 197 (in error, 4 Bingh. 489, 1 M. & P. 402, 2 Y. & J. 146); *Alexander v. Angle*, 1 C. & J. 143, 7 Bingh. 119, 4 M. & P. 870; *Day v. Robinson*, 1 Ad. & E. 554, 4 N. & M. 884; *Harvey v. French*, 1 C. & M. 11; *Gompertz v. Levy*, 9 Ad. & E. 282, 1 P. & D. 214; *Wheeler v. Haynes*, 9 Ad. & E. 286 (a), 1 P. & D. 55.

a short time, but until the *next assizes. It is quite clear, therefore, that he intentionally chose not to make use of the [*264 power of examining Dr. Harris, which that order gave him. If we saw reason to think that there had been any failure of justice in consequence of Lord DENMAN's refusal to postpone the trial, we should undoubtedly have felt disposed to listen to this application. But, considering that the matter had already undergone full discussion in the court of Chancery, there is little reason to doubt that justice has been done. The evidence given by Dr. Harris in the court of Chancery in 1835, would be much more satisfactory to my mind, than his *vivâ voce* evidence given after this lapse of time, when his recollection of what occurred so long ago, must necessarily be very imperfect. I therefore think there should be no new trial.

The only ground upon which a *venire de novo* could be awarded, is, that the judgment ought to be arrested. The question, then, in this case, is, whether there is any ground for arresting the judgment. The argument on the part of the defendant has rested mainly upon some old cases in which it was held that a mere innuendo will not supply the want of certainty in the charge contained in a libel. But those cases cannot apply, where the application of the libellous matter is ascertained by proper introductory averments. In *Solomon v. Lawson*, the innuendo does not impute any misconduct to the plaintiff: the innuendo is, thereby meaning that the water which the plaintiff supplied to the shipping at St. Helena, was bad and unwholesome. It was imputing no offence or misconduct to the plaintiff to say that he supplied bad water, unless it appeared that he had the means of supplying good and wholesome water. It is not stated that the plaintiff knew the water to be bad. Even the innuendo, therefore, imputes no offence to the plaintiff. That case, therefore, is very distinguishable from the *present: and, as this matter is [*265 upon the record, I think we are quite justified in leaving the defendant to such remedy as he may have that way.

MAULE, J. I am of the same opinion. The postponement of the trial was a matter that was entirely in the discretion of the presiding judge. The judge is not in any case bound to put off the trial of a cause, at the instance of the defendant, on the ground of the absence of a witness. And I think in this case the application was very properly refused: the learned judge might well infer that the application was made for the mere purpose of delay.

Taking that part of the declaration to which the motion in arrest of judgment applies, to be a separate and distinct count, it seems to me that it charges something that is actionable. It states, in effect, that the defendant and John Hornblow Turner procured a transfer of stock by means of fraud, by inducing a person of weak and incompetent understanding to execute a power of attorney for that purpose. That is clearly a statement of a wrong done to the plaintiff. I agree that some of the

older cases held that defamatory matter was to be construed *in mitiori sensu*, and that a plaintiff could not by averment impute to them a graver construction. That, however, is not the case now; and the later cases, which decide that slanderous words are to be taken in their ordinary and appropriate sense, are certainly more consistent with reason. If *Solomon v. Lawson* is to be taken to have decided, that, where a libel, speaking of a class of persons, and without mentioning the plaintiff, cannot by proper averments and due proof be shown to have been intended to apply to the plaintiff, I should not feel satisfied with the decision. But I am far from thinking that that case proceeded upon any such ground.

*266] *CRESSWELL, J., not having heard the whole of the argument, pronounced no opinion.

V. WILLIAMS, J. I am of the same opinion. It may well be that the libel charged in the seventh count, was intended to impute gross misconduct to the plaintiff. The declaration alleges it, and the jury have found it. It would be a reproach to the law, if the plaintiff could not recover damages in such a case. And I find no authority that at all militates against his right so to do.

Rule discharged.(a)

(a) See *Wakley v. Healey* (in error), *post*.

MORRISON v. CHADWICK. Feb. 14.

An eviction by a landlord of his tenant, from a part of the demised premises, creates a suspension of the entire rent during the continuance of the eviction; but the tenancy is not thereby put an end to; nor is the tenant thereby discharged from the performance of his covenants other than the covenant for the payment of rent.

Where, therefore, in assumpsit by a landlord against his tenant for breach of a promise to use the premises in a tenant-like manner during the continuance of the tenancy, the latter pleaded, that, during the continuance of the tenancy, and before any breach, the former entered upon part of the premises and evicted him therefrom, and that he thereupon relinquished and gave up, and the landlord had and thence hitherto retained the possession of, the residue of the premises:—Held, that the plea was bad, inasmuch as it did not show a *dissolution of the tenancy*, by mutual consent.

A further plea stated, that, during the tenancy, and before any breach, the premises, and the defendant's estate and interest therein, were duly surrendered to the plaintiff by act and operation of law, that is to say, by the defendant's then quitting the same premises, and every part thereof, with the license and consent of the plaintiff, and relinquishing the possession thereof to the plaintiff, with the intention of putting an end to the tenancy, and by the plaintiff's then accepting such possession, with the intention of putting an end to the same tenancy:—Held, that, if the tenancy continued up to the time of the arrangement stated in the plea, such arrangement would not enure as a surrender by act and operation of law: and also that it was a valid objection to the plea, on special demurrer, that it amounted only to an argumentative denial that there had been any breach during the tenancy.

The defendant also pleaded a set-off, alleging that the plaintiff, before and at the commencement of the suit, *was, and still is*, indebted to the defendant, &c.; to which the plaintiff replied that he "*was not indebted to the defendant, in manner and form,*" &c.:—Held, that this was a sufficiently direct traverse of the continued existence of the supposed debt alleged in the plea.

ASSUMPSIT. The first count of the declaration stated, that, before the commencement of the suit, to wit, on the 1st of March, 1830, in

*consideration that the defendant had become and was tenant to the plaintiff of divers messuages, lands, and premises, with the appurtenances, the defendant then promised the plaintiff to use the said messuages, lands, and premises, with the appurtenances, in a tenant-like and proper manner, for and during the continuance of the said tenancy; and that, although the said tenancy did continue and endure for a long space of time, to wit, from the day and year last aforesaid to the time of the commencement of this suit, yet that the defendant did not nor would, during the continuance of the said tenancy, use the said messuages, lands, and premises, with the appurtenances, in a tenant-like and proper manner, but, on the contrary thereof, the defendant during the continuance of the said tenancy, to wit, on the 2d of March, 1830, and on divers and very many days between that day and the commencement of the suit, so improperly behaved and conducted himself in that behalf, and used the said messuages, lands, and premises, with the appurtenances and chattels therein, in so untenant-like and improper a manner, that, by reason thereof, the said messuages, lands, and premises, with the appurtenances, to wit, on the said 2d of March, 1830, then became and were, and thence hitherto continued, and still remained, ruinous, broken down, destroyed, prostrated, foul, miry, and greatly dilapidated. [*267]

The declaration also contained counts for use and occupation, for money paid, and for money found due upon an account stated.

Second plea,—to the first count,—that the plaintiff, *during the continuance of the said tenancy, and before any breach of the defendant's alleged promise, to wit, on the 31st of August, 1840, with force and arms, and without the consent, and against the will of the defendant, entered into and upon a certain part of the said demised premises, to wit, a part thereof called, to wit, the shed, and then ejected, expelled, put out, and amoved the defendant from the possession thereof; and that, thereupon, the defendant, before any breach of the said promise, and whilst he was so expelled, ejected, put out, and amoved, from the said part of the said demised premises by the plaintiff as aforesaid, to wit, on the day and year aforesaid, wholly quitted, abandoned, relinquished, and gave up to the plaintiff the residue of the demised premises, and the possession thereof, and the plaintiff had from thence forward had the same, and the possession thereof,—verification. [*268]

Special demurrer to the second plea, assigning for causes,—that the said second plea affords no answer in law to the first count; that it states, at most, only an eviction from *a part* of the premises in the first count mentioned, and does not in any manner show a determination of the tenancy in the said first count alleged, before the breach of promise by the defendant in that count mentioned, or at any other time;—that the said second plea only states and shows a trespass on the part of the plaintiff, in ejecting the defendant from a part of the premises in the first count mentioned, and that thereupon the defendant gave up posses-

sion of the residue of the said premises, which the plaintiff has since hitherto had; but that the said second plea does not in any manner show an eviction in point of law, by the plaintiff of the defendant, from any part of the said premises; and that the said second plea does not state or show that the plaintiff kept the defendant ejected from any part of *269] the said premises for any *length of time, nor that the defendant did not, immediately after the supposed eviction of him the defendant, return to the said part of the said premises from which he had been so ejected by the plaintiff, and to the possession thereof;—that the said second plea is ambiguous, in this, that it is uncertain whether the defendant means, in his said plea, to allege and rely upon a supposed eviction of him by the plaintiff from a part of the premises therein mentioned, authorizing the defendant in law to give up the residue of the said premises, and his possession and tenancy thereof, to the plaintiff, and a consequent giving up of such residue by the defendant, and a ceasing of all use and occupation and tenancy thereof by him, or whether the defendant, in and by his said second plea, means to make, and rely upon, an allegation of an eviction of him, the defendant, from a part of the said premises, by the plaintiff, and of a surrender in law by the defendant to the plaintiff of the residue of the said premises, or an executed agreement between the plaintiff and the defendant for the giving up of the said residue by the defendant to the plaintiff, and the ceasing of the defendant's tenancy thereof;—that the said second plea does not state or show, either substantially, or in accordance with the rules or forms of pleading, any facts amounting to a surrender in law of the said residue of the premises in the said second plea mentioned, or of the whole or any part of the premises in the first count mentioned, nor any executed agreement between the plaintiff and the defendant for the determination of the defendant's said tenancy thereof; that the facts in the said second plea alleged are not pleaded as, or as amounting to, a surrender in point of law, and that the said second plea does not show that the defendant gave up possession of the said residue of the premises therein *270] mentioned, by the license or consent of the plaintiff, or *with the intention of putting an end to the defendant's said tenancy as to any part of the said premises, or that the plaintiff in any way accepted the possession thereof, or accepted the same with a like intention;—that the said second plea is an argumentative denial of the allegation in the first count, which is to the effect that the defendant, during the continuance of the said tenancy in the first count mentioned, used the said messuages, lands, and premises therein mentioned in the untenant-like and improper manner in the said first count mentioned;—and that the said second plea improperly concludes with a verification.

Third plea,—to the first count,—that, during the said tenancy, and before any breach of the defendant's said promise, to wit, on the 31st of August, 1840, the said messuages, lands, and premises, and the said

estate, term, and interest therein, were duly surrendered to the plaintiff by act and operation of law, that is to say, by the defendant's then quitting the said messuages, lands, and premises, and every part thereof, with the license and consent of the plaintiff, and relinquishing the possession and enjoyment thereof to the plaintiff with the intention of putting an end to the same tenancy, and by the plaintiff's then accepting such possession and enjoyment thereof, with the intention of putting an end to the same tenancy,—verification.

Demurrer to the third plea, assigning for causes,—that the said third plea is an argumentative denial of the allegation in the said first count, which is to the effect that the defendant, during the continuance of the said tenancy in the first count mentioned, used the said messuages, lands, and premises therein mentioned in the untenant-like and improper manner therein mentioned;—that the said third plea alleges a surrender by act and operation of law, and yet does not show, with sufficient certainty, any such surrender;—that the "surrender alleged" in the said third plea is not shown to have been in writing;—that it is uncertain [*271 whether, in the said third plea, the defendant means to rely on a surrender by operation of law, or on a surrender in fact;—and that the said third plea alleges two repugnant and incompatible modes of surrender, and is calculated to embarrass and perplex the plaintiff.

Fifth plea,—to the second and subsequent counts,—that the plaintiff, before and at the time of the commencement of this suit, *was, and still is*, indebted to the defendant in a large sum of money, to wit, &c., for work then done, and materials for the same provided, by the defendant for the plaintiff, at his request, and for goods, chattels, fixtures, and effects bargained and sold, and sold and delivered, and relinquished, surrendered, and given up by the defendant to the plaintiff, at his request, and for money by the plaintiff before that time had and received for the use of the defendant, and for money due and owing from the plaintiff to the defendant for interest for the forbearance by the defendant to the plaintiff, at his request, for divers long spaces of time, of moneys due from the plaintiff to the defendant, and for money due and owing from the plaintiff to the defendant upon an account stated between them; which said sum of money so due to the defendant as aforesaid, equals the damages sustained by the plaintiff by reason of the non-performance by the defendant of the said promise in the second and subsequent counts of the declaration mentioned, and out of which said sum of money so due and owing to the defendant as aforesaid, the defendant is ready and willing, and hereby offers, to set off and allow to the plaintiff the full amount of the said damages, according to the form of the statute in such case made and provided,—verification.

Replication to the fifth plea,—“And the plaintiff, as to the defendant's last plea, says that he *was not* *indebted to the defendant, [*272

in manner and form as in the defendant's said last plea is alleged; concluding to the country.

Demurrer to the replication to the fifth plea, assigning for causes,—that it neither properly traverses nor confesses and avoids the plea,—that, if it is intended to be in confession and avoidance, it is bad, for not confessing any *prima facie* or colourable right in the defendant, and for concluding to the country instead of with a verification;—that, if it is intended as a traverse, it is bad, for tending to raise an immaterial issue, to wit, whether or not the plaintiff *was* indebted to the defendant in manner and form in the said last plea alleged;—that the said replication takes too narrow a traverse, to wit, by traversing only that the plaintiff *was* indebted as alleged, instead of traversing that he *was and is* indebted as alleged;—that the said replication departs and varies from the usual course of precedents, and tends to embarrass and perplex the defendant, in this, to wit, that it leaves him in doubt as to how much of his said plea is admitted or denied, what evidence he should be prepared to adduce in support of his plea, what evidence by the plaintiff will entitle him to a verdict, what will be the effect of a verdict either in his or the defendant's favour;—and that the said replication is ambiguous and uncertain, because it does not in terms admit or deny that the plaintiff *was* indebted to the defendant at the time of his pleading his said last plea, &c.

Joinders in demurrer.

T. Jones, in support of the demurrer. The first count charges the defendant with a breach of the agreement, in suffering the premises to be out of repair during the term. The plea is a mere argumentative denial of the existence of the tenancy at the time of the alleged breach. *273] [MAULE, J. The plea is evidently *drawn to meet the view, that a partial eviction is no answer to an action for suffering the premises to be out of repair, the tenant retaining the rest.] No doubt it is; but for that there is no authority. [V. WILLIAMS, J. *Newton v. Allin*, 1 Q. B. 518, shows that an eviction from *part* of the premises, is no answer to a breach of the covenant to repair.] In that case, the landlord declared against the tenant for breaches of covenants,—to repair, not to plough up meadow land without consent, or depasture orchards, except, &c., not to cut wood, and not to assign, or underlet without consent,—with an averment that the plaintiff entered, and that the breaches were committed during the continuance of the demise. The defendant pleaded, that, after he had taken possession, and before breach, one B. entered upon a *parcel* of the demised premises, and ejected the defendant, and kept him out from thence hitherto, and committed certain specific grievances upon the premises, whereby the defendant lost all the benefit he would otherwise have made by his occupation; and that B. had full power and authority from the plaintiff so to act. The plea did not state that the defendant had quitted possession, except as above: it was held bad, on demurrer to the replication; Lord DENMAN saying—

"The objection to the plea is insurmountable: the defendant could not at the same time exercise the rights of a tenant, and yet contend that he was not a tenant."

A similar objection arises upon the third plea. It alleges, that, during the tenancy, and before any breach, the premises, and the defendant's interest therein, were duly surrendered to the plaintiff by act and operation of law. That is clearly bad, as an argumentative denial of the continuance of the tenancy. [MAULE, J. In both pleas, the allegation that the tenancy was put an *end to, is an affirmative allegation, not a negation.] If the defendant means to deny an allegation in the [*274 declaration, he must do it in the negative of the words the plaintiff has used in his declaration. [MAULE, J. The defendant says, that, before the alleged breach, he surrendered the premises to the plaintiff, and the plaintiff accepted possession of them. If he proves that, the allegation as to the committing of waste, is immaterial.] No plea can be good, unless it be an absolute denial, in negative terms, of the words in the declaration, or be pleaded in confession and avoidance. This plea is not a direct traverse of anything in the declaration; nor is it consistent with the fact of the defendant's having been guilty of waste during the tenancy.

The replication to the fifth plea states that the plaintiff *was not* indebted to the defendant, in manner and form as in the plea alleged. The ground of demurrer, in substance, is, that the replication should have traversed that the defendant *was* and *is* indebted, &c. The allegation in the plea, that the plaintiff *was and still is* indebted, has reference to the time of the plea. In *Dendy v. Powell*, 3 M. & W. 442, 6 Dowl. P. C. 577, it was held that a plea of set-off which stated that, "before and at the time of the commencement of the action, the plaintiff *was* indebted to the defendant," &c., without adding "and *still is* indebted," is bad, on demurrer. [MAULE, J. To say that the plaintiff *is* not indebted at the time of the replication, would be denying something which is not alleged in the plea.]

Peacock, *contrà*. The second and third pleas are not argumentative. The only promise in the declaration is one which the law will imply,—a promise arising out of the existence of the tenancy. It is an affirmative promise that the defendant will use the premises in a *tenant-like manner. The plea, in substance, is, that the defendant was unable to perform this promise, because, as to part of the premises, the plaintiff evicted him, and, as to the rest, he surrendered them, and the plaintiff received possession of them. [COLTMAN, J. Have you any authority for saying that an eviction from part entitles the tenant to give up the entire premises?] In *Smith v. Raleigh*, 3 Camp. 518, it was held, that, where premises are let at an entire rent, an eviction from part, if the tenant thereupon gives up possession of the residue, is a complete defence to an action for use and occupation. And, in a note, the reporter adds: "This case was recognised by DALLAS, C. J., in *Stokes v. Cooper*,

Worcester Lent assizes, 1814, in which the rule was laid down, that, after eviction from part, the landlord cannot recover upon the original contract, and the tenant, by giving up the possession of the residue, is entirely discharged; but that, if the tenant, after eviction, continues in possession of the residue, he may be liable upon a *quantum meruit*. Vide Dalston v. Reeve, 1 Ld. Raym. 77, Clun's case, 10 Rep. 128." [V. WILLIAMS, J. Does an eviction from part of the premises do anything more than operate a suspension of the rent? MAULE, J. It is difficult to see why it should not discharge the tenant from the performance of all the other duties also. V. WILLIAMS, J. What becomes of the estate?] It may remain where it was. [MAULE, J. The material part of the plea is, not the landlord's taking possession of part, but the tenant's giving up the rest. Newton v. Allin, 1 Q. B. 518, 1 G. & D. 44, seems to assume, that, if the tenant had chosen to avail himself of the right to relinquish the rest of the premises, he would have been released from all the duties of tenant. COLTMAN, J. Is there any case where the tenant has been held to be *276] discharged from his covenant *by reason of the act of the evictor making it impossible for him to perform it? MAULE, J. He may be evicted from a portion that is essential to the performance of the covenant.] Newton v. Allin was the case of a covenant under seal. Here, the defendant is charged upon a mere contract implied by law: and his contention is, that, by reason of what has taken place, the contract implied by law is gone. [V. WILLIAMS, J. Does the plea amount to an averment that the plaintiff accepted the possession? MAULE, J. The material part of the plea is, the abandonment. The argument requires that the term should be still subsisting.] It undoubtedly does so.

The substance of the declaration is, that the defendant became tenant, and that the tenancy continued at the time of the breach. The plea states, that, during the tenancy, and before breach, that took place between the parties which amounts to a surrender by act and operation of law. In Grimman v. Legge, 8 B. & C. 324, 2 M. & R. 438, A. demised to B. the first and second floors of a house, for a year, at a rent payable quarterly; during a current quarter, some dispute arising between the parties, B. told A. that she would quit immediately; the latter answered, she might go when she pleased: B. accordingly quitted, and A. accepted possession of the apartments: and it was held that A. could neither recover the rent, which, by virtue of the original contract, would have been due at the expiration of the quarter, nor rent *pro rata*, for the actual occupation of the premises for any period short of the quarter. HOLROYD, J., there says, 8 B. & C. 325: "Where, by express contract, rent is reserved payable quarterly, the landlord cannot recover *277] a proportionable part of the rent for the occupation of *his premises for any period less than a quarter." And BAYLEY, J., says: "A parol license to quit will not of itself operate as a surrender of the tenant's interest But, where the tenant gives up possession, in

pursuance of such a license, and the landlord accepts it, the license, coupled with the fact of the change of possession, operates as a surrender by act and operation of law, and the landlord cannot recover any rent which becomes due after his acceptance of the possession." So, in *Dodd v. Acklom*, 6 M. & G. 672, 7 Scott, N. R. 415, A. and B. demised a house by lease in writing to C., at a rent payable quarterly: the key was delivered to C.'s wife: C. entered into possession; but, before the first quarter's rent became due,—there having been some dispute as to arrears of rent and taxes,—C.'s wife delivered back the key to A. who accepted it: B., after signing the lease, had never interfered:—it was held that the delivering back the key by the tenant, *animo sursumreddendi*, and the acceptance thereof by the landlords, amounted to a surrender of the term by act and operation of law, within the statute of frauds. [*T. Jones*. The surrender, to be valid, should be in writing. V. WILLIAMS, J. At common law, no writing was necessary; and surrenders by act and operation of law are expressly excepted out of the statute of frauds. *T. Jones*. The surrender here set up, is a surrender by act of the parties; and therefore must be in writing. MAULE, J. If Mr. *Jones's* argument is well founded, it brings it back to the same question as that which arises upon the second plea.]

The replication to the fifth plea is entirely out of the usual form, and is clearly bad. The allegation in the plea is, that the plaintiff, at the time of pleading, "*was and still is indebted, &c.*" [MAULE, J. That is, at the time of the commencement of the suit, and from thence *to the time of pleading.] The plaintiff was bound by his replication to traverse the allegation in the plea. [MAULE, J. He [*278 does so. At the time of which the replication speaks, the plaintiff denies that he *was* indebted at the time and in the manner mentioned in the plea. It seems to me, I confess, the appropriate way of doing it.] In *Atkinson v. Davis*, 11 M. & W. 236, to a declaration by the payees against the acceptor of a promissory note, the defendant pleaded that one T. D., the brother of the defendant, then deceased, was, in his lifetime, indebted to the plaintiffs in a large sum of money, to wit, to the amount in the promissory note specified; and that, after his death, and before interment, one of the plaintiffs, by a threat, that, unless the defendant would make and deliver the note, the plaintiffs would prevent the funeral of his brother from taking place, procured the making of the note from the defendant, who then made and delivered the same upon such threat, and for no other cause whatever: the plea also averred that there never was any consideration for the making of the note, and that the plaintiffs always held the same without value: replication, that one of the plaintiffs did not, by a threat, that, unless the defendant would make and deliver the note, the plaintiffs would prevent the funeral of the defendant's brother from taking place, procure from the defendant the note, in manner and form alleged: it was held,—first, that the repli-

cation was a good answer to the whole plea,—secondly, that, where a replication traverses part of the plea, but leaves unanswered so much of it as forms a defence to the action, at the same time not expressly admitting it, the court cannot give judgment *non obstante veredicto*, or arrest the judgment, but the proper course is to award a repleader.

*279] [MAULE, J. You have raised a *ghost, which I think you will find some difficulty in laying.] It may be that the replication would be a good answer if found for the plaintiff, but not otherwise. [MAULE, J. One who traverses a fact in his adversary's plea, does not admit any other facts therein, except the traverse is found against him.] In *Faithful v. Ashley*, 1 Q. B. 183, to a count in debt, alleging that the defendant *was indebted* to the plaintiffs in 10*l.* for work, &c., the defendant pleaded, that he *never was indebted* to the plaintiffs in a greater amount than 4*l.* in respect of the causes of action in the declaration mentioned, and, as to 4*l.*, payment into court: the plaintiffs replied that the defendant *was indebted* to them in a greater amount than the said sum, &c., in respect of the causes, &c.; and the replication was held bad, for not alleging that the defendant was *and is* indebted, &c.(a)

T. Jones, in reply. To show the replication to the fifth plea good, all that is necessary is, to make out that the words "was not indebted" have reference to the time of plea pleaded. [V. WILLIAMS, J. Unambiguously.] There is nothing doubtful or ambiguous in this replication. If the plaintiff had said that he *is not* indebted, it could only be good by holding, by a liberal construction, that it meant that he *was not* indebted at the time in the plea mentioned. [V. WILLIAMS, J. Suppose to a plea of *plene administravit*, the plaintiff were to reply that the defendant *had* assets,—what would that mean? MAULE, J. The question is whether the "*modo et forma*" does not make the replication sufficient. The object of it is, to save the repetition of all the circumstances that constitute the manner and form.] Including *time*.

*280] *It is said that the second plea shows that the plaintiff has estopped himself from complaining of the defendant's breach of contract. That, in substance, amounts to this, that an eviction from part of the premises, is an answer to the action. [MAULE, J. That the defendant's breach of contract is excused.] Assuming that it does substantially amount to an excuse, is it well pleaded? It is clearly bad, as showing a suspension of the relation of landlord and tenant. Why is it, that an eviction of the tenant from part of the premises, followed up by a relinquishment of the rest, discharges the tenant from the performance of his contract? The landlord says—"You owe me a duty." "True," says the tenant, "I did owe you a duty; but you have discharged me, by an act which operates a suspension of the relation of landlord and tenant between us." [MAULE, J. I think you will find it difficult to show that the eviction puts an end to the term.] It operates a suspen-

(a) *Vide post*, 285 (a).

sion of the tenancy,—of the right of the landlord to demand the rent and the performance of the covenants, and of the right of the tenant to have possession of the premises on payment of the rent. An allegation of a tenancy, can only mean a holding in fact, or that the party has a right to the possession of the premises as tenant. [MAULE, J. Fealty is essential to a tenancy, but not rent. There is a great deal in Littleton on Tenures, about tenures, where nothing is said about contract.] The plea is clearly bad in form: it does not confess that the defendant was guilty of a breach during the tenancy; and it is an argumentative denial only. Assuming it to be a good defence in substance, it is informally pleaded,—like the case put in *Doctrina Placitandi*, page 41, where, in trespass for taking away the plaintiff's goods, a plea that the plaintiff *never had any goods, was said to be an infallible argument, and [*281 yet no plea.

The third plea does not show a surrender by operation of law; which is altogether irrespective of the intention of the parties. In *Lyon v. Reed*, 13 M. & W. 285, it was held that the term "surrender by operation of law," is properly applied to cases where the owner of a particular estate has been a party to some act the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate continued to exist. Thus, where a lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not the power to make the new lease; and, as the lessor could not grant the new lease until the prior one had been surrendered, the acceptance of such new lease was of itself a surrender of the former one. "All the old cases," says PARKE, B., "will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says, that the act itself amounts to a surrender. In such case, it will be observed there can be no question of intention. The surrender is not the result of intention. It takes place independently, and even in spite, of intention." If the Court of Exchequer be right in that case, there can be no surrender by act and operation of law, unless the law can infer the intention; and that is not the case here. Then, if this be a surrender by act of the parties, the 29 Car. 2, c. 3, s. 3, avoids it. In 1 Williams's Saunders, 277 a, b, (2), it is laid down, that "where a thing is originally made by act of parliament, and required to be in writing, it must be pleaded with *the circumstances required by the act; as, in the case of a will of lands, it [*282 must be alleged to have been made in writing; but, where an act makes writing necessary to a matter where it was not so at the common law,—as in the case in the preceding note, where a lease for a longer term than three years is required to be in writing, by the statute of frauds,—it is not necessary to plead the thing to be in writing, though it must be proved

to be so in evidence, Anonymous, 2 Salk. 519. *A distinction, however, is taken between a declaration and a plea: in the former the plaintiff need not show the thing to be in writing; but, in the latter, it must be so pleaded.* As, where the defendant pleads that another person, for a good consideration, promised to be answerable to the plaintiff for the debt,—it was held that it must be shown to be in writing, so that it may appear to be a contract which the plaintiff can enforce:” Case v. Barber, Sir T. Raym. 450. Cur. adv. vult.

COLTMAN, J., now delivered the judgment of the court.

This was an action by a landlord against his tenant, founded on a promise to use the demised premises, during the continuance of the tenancy, in a tenant-like manner. The breach alleged, is, that, during the continuance of the tenancy, he used them in so untenant-like a manner that they became ruinous, &c. There was also a count for use and occupation, and there were the money counts.

To the first count of the declaration, the defendant pleaded,—secondly, that the plaintiff, during the continuance of the tenancy, and before any breach, entered into a certain part of the demised premises, to wit, *283] the shed, and ejected, expelled, and put out the defendant *from the possession thereof, whereupon the defendant, before any breach, and whilst he was so expelled, &c., wholly quitted, abandoned, and gave up to the plaintiff the residue of the demised premises, and the possession thereof, and the plaintiff has from thenceforward had the same, and the possession thereof.

To this plea the plaintiff demurred, insisting that it amounted only to an argumentative denial of the allegation that a breach was committed during the tenancy.

For the defendant, it was said, that the plea was a good plea in confession and avoidance: for, it was insisted, that, when the plaintiff entered on his tenant, and evicted him from a part of the premises, the tenant was justified in relinquishing the possession of the remainder, and was no longer bound to perform the agreement he had entered into on becoming tenant. But we are of opinion that this proposition cannot be supported.

An eviction by a landlord of his tenant from a part of the premises, creates a suspension of the entire rent during the continuance of the eviction, until the tenant re-enters and resumes possession: see the authorities cited in 1 Wms. Saund. 204, n. (2). But there is no authority for holding that the tenancy is thereby put an end to, or the tenant discharged from the performance of his covenants, other than the covenant for the payment of rent.

It may be urged, that the landlord may have evicted the tenant from the possession of a part of the demised premises, the possession of which part was the main inducement to him to enter into the covenants of the lease, and therefore that he ought not any longer to be bound by them. But it is to be borne in mind, that, in addition to the suspension of the

rent, the lessee may maintain his action against the lessor for the eviction; by which, it is to be presumed that he will obtain *satisfaction [*284 for any inconvenience or loss which he may suffer.

If the eviction of a part by the landlord will not discharge the tenant from the performance of the covenants of his lease, other than the covenant to pay rent, will the relinquishing the possession of the land, and the landlord's taking possession, have that effect? We think it will not; for, the allegations do not show a dissolution of the tenancy by mutual consent. The tenancy, therefore, continues; and, whilst the tenancy continues, the obligation to perform the covenants continues.(a) We think, therefore, the plea is bad.

The third plea alleges a surrender of the tenancy before any breach, by operation of law,—by the defendant's quitting possession of the lands demised, with the consent of the plaintiff, with the intention of putting an end to the tenancy, and by the plaintiff's accepting such possession, with the intention of putting an end to the tenancy.

It was contended, on the part of the plaintiff, that this plea was bad, on the ground that the agreement stated in the plea, would not constitute a surrender by act and operation of law; and that the plea, unless it showed a surrender, furnished no answer to the declaration. And we agree that this is so; for the breach is admitted; and, if the tenancy continued, no answer is given to it.

If, however, it ought to be held,—agreeably to what is said in *Grimman v. Legge*, 8 B. & C. 324, 2 M. & R. 438,—that the plea shows a *surrender by act and operation of law, we think the plea is [*285 bad, on special demurrer, as amounting only to an argumentative denial that any breach had been committed during the continuance of the tenancy.

The fifth plea is a plea of set-off, alleging, in the usual form, that the plaintiff, before and at the time of the commencement of the suit, *was, and still is*, indebted to the defendant in a large sum of money, &c. To this plea the plaintiff, in his replication, says that he *was not* indebted to the defendant in manner and form as in the defendant's last plea is alleged. To this replication the defendant demurred, on the ground that it ought to have alleged that the plaintiff *was not nor is* indebted to the defendant.

The replication in this case deviates from the usual form of pleading: but it appears to us to be grammatically correct,(b) and that the allega-

(a) It would appear, therefore, that, where the lessor has evicted the lessee or assignee, or has taken possession with his assent, the lessee or assignee would, under a covenant to repair, be bound to re-enter upon the lessor for the purpose of doing the repairs. It would, of course, be a good answer to an action of covenant for not repairing, to say that the defendant was prevented by the plaintiff from entering.

(b) Notwithstanding what is said in *Faithful v. Ashley*, 1 Q. B. 183, ante 279 (in which, however, the connecting clause "*modo et forma*" is not mentioned in the statement of the pleadings, and is not noticed in the argument or in the judgment), the usual form is obviously incorrect. It seems to be impossible to attach any meaning to the words, "nor is indebted," in the replication,

tion that the plaintiff *was* not indebted *in manner and form*, amounts to a direct traverse of the matter alleged in the plea, and that it sufficiently answers what is alleged.

The plaintiff, therefore, is, we think, entitled to judgment.

Judgment for the plaintiff.(a)

without involving in the traverse a matter neither expressly nor impliedly contained in the plea, viz. the continued existence of the debt down to the time of the delivery of the replication.

(a) And see *Burn v. Phelps*, 1 Stark. N. P. C. 94; *The King v. The Inhabitants of Baabury* 1 Ad. & E. 136, 3 N. & M. 292, 6 M. & G. 683 (a).

*286] *CROSSFIELD v. MORRISON. Feb. 12.

A., the lessee of certain coal-mines, for a term of years, by indenture assigned the same to B. for the unexpired residue of his term, B. covenanting that he, his executors, &c., would, at all times during *so long as he or they should be in possession or receipt of the rents, produce, and profits of the premises*, pay to the lessors the rents, galeages, and wayleaves reserved and made payable by the original lease, and observe and perform all other the covenants therein contained, and would at all times thereafter keep harmless and indemnified A., his heirs, &c., from and against the rents, covenants, &c.; in the said lease, and from and against all actions, &c., for and in respect of the same covenants, or otherwise in relation thereto.

In covenant by A. against B. upon this indenture, the declaration assigned two breaches,—first, non-payment of the rents and galeages, &c., accruing whilst B. was in possession or receipt of the rents, produce, and profits of the premises,—secondly, that B. had neglected to keep A. indemnified. Plea,—to the whole declaration,—that, at the times when the said rents and galeages became due, B. was not in possession or receipt of the rents, produce, or profits by the indenture assigned, &c.:—

Held, that the issue raised by this plea was an immaterial issue, inasmuch as the restrictive words, “so long as B., his executors, &c., should be in possession or receipt of the rents, produce, and profits of the premises,” did not extend to the covenant to indemnify; and, consequently, that, the jury having found for the defendant on the issue joined on that plea, A. was entitled to judgment *non obstante veredicto*.

If one of several pleas traverses immaterial matter in the declaration, and the defendant pleads other material matters which are disposed of on proper issues raised upon them, the court will not award a repleader.

THIS was an action of covenant.

The declaration stated, that theretofore, and before and at the time of the making of the indenture of lease thereafter mentioned, Margaret Thomas and William Trew were seised in their demesne as of fee, of and in the premises thereafter mentioned to have been demised; and that, being so seised, afterwards, to wit, on the 29th of July, 1835, by a certain indenture of lease then made between the said Margaret Thomas and William Trew of the one part, and the plaintiff of the other part,—proffert,—for and in consideration of the galeage, rents, payments, duties,
*287] covenants, conditions, and *agreements thereafter reserved, mentioned, and contained, on the part and behalf of the plaintiff, his executors, administrators, and assigns, to be paid, rendered, kept, done, and performed, they the said Margaret Thomas and William Trew did demise, lease, and to farm let unto the plaintiff, his executors, administrators, and assigns, all and singular the mine, vein, pit, grove, bed, and hole of coal called The Large Vein, being the vein of coal commonly

worked in the parish of Monythusloyne, lying in and underneath all those two several messuages or dwelling-houses, out-houses, barns, stables, buildings, gardens, and the several closes of lands, arable, meadow, and pasture, which were more particularly delineated, together with the quantities, mears, metes, and bounds thereof, in or by the map or plan endorsed on the first skin of the said indenture, and which lands were called or known by the several names of the Tyn-y-gelly and Lwyn-Celyn farms, then in the several and respective tenures and occupations of John Jones and Richard Lewis, and were situate in the said parish of Monythusloyne, in the county of Monmouth, containing by admeasurement forty-six acres or thereabouts, excepting always so much and such parts of the said veins of coal as might be necessary to remain unworked for the purpose of supporting and keeping effective the main level or tram-road thereafter mentioned, leading or extending from the Pentwyn lands under and through the lands of the said Margaret Thomas and William Trew, to the Pen-y-van-Issa coal lands; and also full and free liberty, license, and authority to and for the plaintiff, his executors, administrators, and assigns, and their respective miners, workmen, colliers, servants, labourers, and others, to open, dig, search for, work, gain, raise, and get all the coal thereby demised (except as aforesaid), and to dig, sink, drive, run, and make, any pits, *shafts, levels, tram and other roads, [288 trenches, drains, and watercourses, in, under, upon, and about the said lands, colliery, and mines or works, as well for the working of the coal thereby demised, as for the purpose of hauling, carrying, and conveying any other coal or minerals, the produce of any other collieries or estates, and particularly to continue the main level or carriage road then in progress through the Pentwyn lands, under and through the said lands of the said Margaret Thomas and William Trew, till it reaches the Pen-y-van-Issa coal lands; and also to erect, build, and set up in and upon the said lands and premises, or any part thereof, storehouses, smithies, forges, mills, engines, hovels, sheds, and other buildings and machines, for the better and more effectually working of the said colliery or coal-mines, and the accommodation of the colliers, miners, and others, who should be, from time to time, employed in and about the said colliery and mines; but no such building or machine should be erected within one hundred yards of any dwelling-house then being upon the said lands, without the consent of the said Margaret Thomas and William Trew, their heirs and assigns, had and obtained; and also to construct and make yard spoil banks and deposits of coal or rubbish upon the said lands; and, for the purpose of using and exercising the several powers and authorities thereby granted, to take, use, and occupy so much of the surface of the said lands as might be reasonably necessary, he the said plaintiff, his executors, administrators, and assigns paying, for so much and such parts of the surface of the said lands as might be used for any of the purposes aforesaid, the fair and just value thereof; and also to

raise and quarry from and out of the said lands, and to use in the erection of the buildings and works to be set up under the powers therein contained, all such stone, clay, and sand, as might be reasonably required for *289] *such purpose; and likewise full and free license and authority to bring out, up, convey through, and work, raise, and get up, by means of the said lands thereinbefore described, or any part thereof, from or out of any other lands, any other coals or minerals whatsoever than those thereby demised; and likewise full and free liberty of ingress, egress, and regress, to and for the plaintiff, his executors, administrators, and assigns, agents, workmen, labourers, servants, customers, and dealers, in and upon the said farm and lands, with horses, carts, and other carriages, to and for the working, hauling, and carrying away the said coal, and the using and exercising the several powers thereby granted, at all times at his and their will and pleasure, without any interruption, molestation, hindrance, obstruction, denial, or impediment of or by the said Margaret Thomas and William Trew, or either of them, their heirs or assigns, or the heirs and assigns of either of them,—subject, nevertheless, to the covenants and restrictions on the part of the lessee thereafter contained, To have, hold, use, exercise, and enjoy the said mines, vein, pit, grove, bed, and hole of coal (except as aforesaid), and all and singular other the privileges, liberties, powers, and premises thereby granted, demised, and leased as aforesaid, or intended so to be, with their and every of their appurtenances, unto the plaintiff, his executors, administrators, and assigns, from the 1st of May, 1834, for and during and unto the full end and term of twenty years thence next ensuing, and fully to be complete and ended; and to have and to hold all and every the coal thereby demised that should or might be found or raised during the said term thereby granted, or intended so to be, unto him the plaintiff, his executors, administrators, and assigns, and as his and their own proper goods and chattels,—Yielding and paying therefor, for every ton *290] of large marketable coals, of the *weight of 20 cwt., of 112 lbs. to the cwt., that should be raised, gotten, and brought out from and underneath the said lands, and being the produce thereof, the royalty, galeage, or sum of 9*d.*; and also, in case such royalty, galeage, or sum of money should not amount to the yearly sum of 42*l.* 5*s.*, then yielding and paying, during so many years of the said term thereby granted as the said coals thereby demised (except as aforesaid) should continue unworked and unexhausted, and until all such large marketable coal (except as aforesaid) as, according to the usual mode of working by level, ought to be worked out, should be exhausted, but no longer, such further amount, rent, or royalty, as, with the said galeage, in case any should become due, should amount in the whole to the yearly rent or sum of 42*l.* 5*s.*; but, in case no such galeage should become due, then yielding and paying the rent or sum of 42*l.* 5*s.*, such yearly rent to be computed from the commencement of the said demise; and

also yielding or rendering, on demand, so long as any of the coals thereby demised should be worked and raised, one ton and five hundred weight of coals weekly for the use of the said Margaret Thomas and William Trew, free of charge, such coal to be delivered on the tram-road of the Monmouthshire Canal Company, at the point where the coals worked from the said lands should be first placed upon such tram-road; and also yielding and paying for such quantity of coal as should remain unworked, for the purpose of supporting the said road leading from the Pentwyn lands to the Pen-y-van-Issa coal lands, the said galeage of 9*d.* *per* ton, of the weight aforesaid; and also yielding and paying for every 5½ tons of coal, of the weight thereinbefore mentioned, not being the produce of the lands thereinbefore described, which should be conveyed by the plaintiff, his executors, administrators, or assigns, or any other *person or persons by his or their authority, through the said [291 lands, and should have been raised and gotten from and out of the Pen-y-van-Issa estate, the property of Robert Phillips, Esq., the way-leave or sum of 9*d.*, for every 11 tons of coals, of the weight aforesaid, not being the produce of the lands thereinbefore described, which should be conveyed by the plaintiff, his executors, administrators, or assigns, through the said lands, and should have been raised and gotten from and out of any other lands than the Pen-y-van-Issa estate, the way-leave or sum of 9*d.*; and it was thereby declared and agreed that the rents, royalties, and sums of money thereby reserved, should be paid free from taxes, without any reduction or abatement on account of any claim made or to be made by Benjamin Hall, Esq., lord of the manor of Abercarne, of, for, or in respect of the said coals, or any of them, or the working, raising, or carrying away of the same, or otherwise howsoever; and that, whilst the said rent of 426*l.* 5*s.* should continue due and payable, the same should be paid by quarterly payments on the 1st of August, the 1st of November, the 1st of February, and the 1st of May,—the first of such payments to be calculated as having become due and payable on the 1st of August, 1834; and that, in case the said royalty or galeage of 9*d.* *per* ton should exceed in any one year of the said term, the said rent of 426*l.* 5*s.*, such excess should be paid at the expiration of such year; and that, at the same time, all such sums as during the preceding year might have become due for way-leave, should be paid,—all and every the payments thereby reserved, being made by the promissory notes or acceptances of the plaintiff, his executors, administrators, or assigns, payable in two months from the time when the said rents, galeages, or sums of money should have become due and payable: And the plaintiff did thereby, for himself, his heirs, executors, and *administrators, covenant, promise, and agree to and with the [292 said Margaret Thomas and William Trew, their heirs and assigns, that he, the plaintiff, his executors, administrators, or assigns, or some or one of them, should and would well and truly pay or cause to be paid

unto the said Margaret Thomas and William Trew, or to one of them, their or one of their heirs or assigns, or other the person or persons who, under the reservations thereinbefore contained, should be entitled to receive the same, the said rent, galeage, and wayleave, and yield and render the coal thereinbefore reserved, at the respective times, and in the manner and proportion thereinbefore mentioned: That afterwards, and during the continuance of the said demise, to wit, on the 1st of January, 1845, by a certain indenture of assignment then made between the plaintiff of the first part, the defendant of the second part, and one John Reid of the third part,—profert,—the plaintiff, for the considerations therein mentioned, did bargain, sell, assign, transfer, and set over unto the said John Reid, his executors, administrators, and assigns, all and singular the mine, vein, pit, grove, bed, and hole of coal, liberties, privileges, licenses, powers, and authorities, rights, members, and appurtenances demised by and then held under and by virtue of the said indenture of lease (except as is there mentioned to be excepted) and also the said indenture of lease, To hold the same (except as aforesaid) unto the said John Reid, his executors, administrators, and assigns, from thenceforth, for and during all the residue then to come and unexpired of the said term of twenty years granted by the said indenture of lease, and to hold, possess, and enjoy the coals that should and might during the said term be found, gotten, or raised in or under the hereditaments mentioned in the said indenture of lease, unto the said John Reid, his executors, administrators, and assigns, to and for his and their own absolute *293] *use and benefit, as his and their own proper goods and chattels, —subject, nevertheless, to the payment of the several rents, galeages, wayleaves, and sums of money in and by the said indenture of lease reserved and made payable, save only the arrears thereof, if any, to the day of the date of the said indenture of assignment, and to the performance and observance of the covenants, conditions, provisoes, declarations, and agreements therein contained on the part of the tenant, lessee, or assignee, his executors, administrators, and assigns, to be paid, observed, and performed; and it was thereby declared by and between the said parties to those presents, that the said John Reid, his executors, administrators, and assigns, should stand possessed of all and singular the premises thereinbefore assigned, or otherwise assured, or intended so to be, upon the trusts, and for the intents and purposes thereafter expressed and contained, that is to say, in trust for the said defendant, his executors, administrators, and assigns, until default should be made by him in payment of the sum of 1575*l.* and interest, or any part thereof respectively, in the shares, or at all the times, and in the manner thereinbefore appointed for the payment thereof respectively, or until default should be made by the defendant, his heirs, executors, or administrators, in the performance of the covenants thereafter contained on the part of the defendant; and upon this further trust, that, if the defendant, his

heirs, executors, administrators, or assigns, should pay or cause to be paid the said sum of 1575*l.*, and the interest thereon, to the plaintiff, his executors, administrators, or assigns, in the shares, or at the times, and in the manner thereinbefore appointed for payment thereof respectively, and should duly and faithfully perform the covenants of him the defendant thereafter contained, then, and in that case, he, the said John Reid, his executors, *administrators, and assigns, should, immediately after such payment should be so made as aforesaid, upon [*294 the request, and at the costs and charges of the defendant, his executors, administrators, or assigns, assign the said mine, vein, pit, grove, bed, and hole of coal, and other the said premises thereby assigned, or intended so to be, with their appurtenances, unto the defendant, his executors, administrators, or assigns, for and during all the residue which should be then unexpired of the said term thereby assigned, or intended so to be, for his and their own use and benefit; but, if default should be made by the defendant, his executors, administrators, or assigns, in the payment of the said sum of 1575*l.* and interest, or any part thereof respectively, for the space of fourteen days next after any one of the several days or times thereinbefore appointed for payment of the same respectively,—the same having been demanded in writing; or, if default should be made in performance of the covenants of the defendant thereafter contained, or any or either of them; then, and in either of the said cases, and immediately thereupon, upon trust that he the said John Reid, his executors, administrators, or assigns, did and should absolutely sell and dispose of the said mine, vein, pit, grove, bed, and hole of coal, and premises thereby assigned, or intended so to be, in manner therein mentioned; and the defendant did thereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the plaintiff, his executors and administrators, that he the defendant, his executors, administrators, or assigns, or some or one of them, should and would, at all times *during so long as he or they should be in possession or receipt of the rents, produce, and profits of the said premises thereby assigned, under the trusts thereinbefore contained*, well and truly pay, or cause to be paid, unto the lessors of the said premises, or the person or persons who, *under the reservations contained in the said lease, should be [*295 entitled to receive the same, the rents, galeages, and wayleaves therein reserved and made payable, and should and would yield and render the coals therein reserved, at the respective times, and in the manner and proportions therein mentioned; and should observe, perform, and fulfil all other the covenants, conditions, provisions, and agreements therein contained, which, on the part of the lessee or assignee of the said premises, ought to be paid, observed, and performed, or such of them as then remained subsisting, unperformed, or capable of taking effect; and should and would, at all times thereafter, effectually keep harmless and indemnified the said plaintiff, his heirs, executors, and administrators, and also

the said John Reid, his executors, administrators, or assigns, of, from, and against the rents, covenants, conditions, provisions, stipulations, and agreements, reserved and contained by and in the said indenture of lease, and of and from and against all actions, suits, costs, charges, damages, and expenses, claims, and demands whatsoever, for or in respect of the same covenants, conditions, provisions, stipulations, and agreements, or otherwise in relation thereto: That, after the making of the said indenture of lease, and during the continuance of the said demise, to wit, on the 28th of September, 1836, the said William Trew departed this life, leaving the said Margaret Thomas him surviving, who thereupon, to wit, on the day and year last aforesaid, became and was seised of the reversion of and in the said demised premises, and entitled to the rents, galeage, and wayleave reserved and made payable by the said indenture of lease as aforesaid; and, being so seised and entitled, she, the said Margaret Thomas, theretofore, and after the 1st of January, 1838, to wit, on the 18th of July, 1838, duly made and published her last will and *296] testament in writing, bearing date the *day and year last aforesaid,—and which said will was then duly signed at the foot thereof by the said Margaret Thomas, in the presence of two credible witnesses, present at the same time, and was then attested and subscribed by such witnesses, in the presence of the said Margaret Thomas, according to the form of the statute in such case made and provided,—and thereby, amongst other things, gave and devised the said demised premises unto Dacey Miles, Elizabeth Watkins, and Moses Watkins, their heirs and assigns, and then appointed the said Dacey Miles, Elizabeth Watkins, and Moses Watkins, executrix and executors of her said will; and the said Margaret Thomas afterwards, to wit, on the day and year last aforesaid, died so seised of the said reversion of and in the said demised premises, with the appurtenances, as aforesaid, without altering her said will as to the said devise of the said demised premises; whereupon and whereby the said Dacey Miles, Elizabeth Watkins, and Moses Watkins, became and were seised of the said reversion, in their demesne as of fee; and, being so seised, afterwards, to wit, on the day and year last aforesaid, the said Dacey Miles and Moses Watkins departed this life, leaving the said Elizabeth Watkins them surviving, who then became, and, at the time of the making of the payments by the plaintiff as thereafter mentioned, was seised of the said reversion, in her demesne as of fee, and was the person who, under the reservations contained in the said lease, was entitled to the rents, galeages, and wayleaves therein reserved and made payable: That, afterwards, and whilst the defendant remained and was in possession or receipt of the said rents, produce, and profits of the said premises by the said last-mentioned indenture of assignment, under the trusts of the said indenture of assignment contained, to wit, on *297] the 10th of August, 1846, a large sum of money, to wit, the sum of *106*l.* 11*s.* 3*d.*, of the rent or sum of 426*l.* 5*s.*, of the yearly

rent aforesaid, reserved by the said indenture of lease, became and was due and payable to the said Elizabeth Watkins, under and by virtue of the said indenture of lease, for one quarter's rent, due on the day and year last aforesaid; and that, afterwards, and whilst the defendant remained and was in possession or receipt of the rents, produce, and profits as aforesaid, to wit, on the 1st of November, in the year last aforesaid, a certain other large sum of money, to wit, the further sum of 106*l.* 11*s.* 3*d.*, of the rent or sum of 426*l.* 5*s.* of the yearly rent aforesaid, reserved by the said indenture of lease, also became and was due and payable to the said Elizabeth Watkins, under and by virtue of the said indenture of lease, for another quarter's rent due on the day and year last aforesaid; and that afterwards, and whilst the defendant remained and was in possession or receipt of the said rents, produce, and profits as aforesaid, to wit, on the day and year last aforesaid, a certain other large sum of money, to wit, the sum of 111*l.* 18*s.* 4*d.*, for a galeage rent of 9*½d.* per ton, of the weight aforesaid, for 2755 tons of coal which remained unworked, for the purpose of supporting the said road leading from the Pentwyn lands of the Pen-y-van-Issa coal lands, became and was also due and payable to the said Elizabeth Watkins, under and by virtue of the said indenture of lease,—of all which the defendant then had notice: Yet the defendant and the said John Reid, although often requested so to do, did not nor would, nor did nor would either of them, pay the said rents or sums of 106*l.* 11*s.* 3*d.*, 106*l.* 11*s.* 3*d.*, and 111*l.* 18*s.* 4*d.*, or any or either of them, or any part thereof, or give their or either of their promissory notes or acceptances for the same, or any part thereof, but wholly neglected and refused so to do; and thereupon, afterwards, and before the commencement of this suit, to wit, on the 2d of December, 1846, the now plaintiff *was called upon to pay, and [298 was forced and obliged to pay, to the said Elizabeth Watkins, a large sum of money, to wit, the sum of 250*l.*, for, on account, and in satisfaction and discharge of the said last-mentioned rents, and which were then due and payable to her as aforesaid, under and by virtue of the said indenture of lease; and the plaintiff was also put to great costs, charges, and expenses, in consequence of the non-payment of the said rents, and non-performance of the said covenants in the said lease contained as aforesaid, in the whole amounting to a large sum of money, to wit, to the sum of 350*l.*,—of all which the defendant, afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, also had notice; yet the defendant, disregarding his said covenant in that behalf made as aforesaid, had not (although often requested so to do) kept harmless and indemnified the plaintiff, of, from, and against the said rents, covenants, conditions, provisions, stipulations, and agreements reserved and contained by and in the said indenture of lease, and of, from, and against all actions, suits, costs and charges, damages and expenses, claims and demands whatsoever, for or in respect of the cove-

nants, conditions, provisions, stipulations, and agreements, or otherwise in relation thereto, but, on the contrary thereof, had wholly neglected and refused, and still did neglect and refuse, to keep harmless and indemnified the plaintiff against the said sums of 106*l.* 11*s.* 2*d.*, 106*l.* 11*s.* 3*d.*, and 111*l.* 18*s.* 4*d.*, so by him paid to the said Elizabeth Watkins, for the rents aforesaid, or any or either of them, or any part thereof, or of, from, or against the costs, charges, damages, and expenses by him sustained as aforesaid, in consequence of the non-payment of the said rents and non-performance of the said covenants in the said lease contained, and which on the lessee's part ought to have been performed; and so the plaintiff

*299] *in fact said that the defendant had not kept his said covenant, &c.

The defendant pleaded,—first, that the said Margaret Thomas and William Trew did not, by the said indenture in the declaration first mentioned, demise, &c., unto the plaintiff, his executors, &c., the said mines, vein, pit, grove, bed, and hole of coal, and other the premises, except as aforesaid, in manner and form, &c.

Secondly, that the said supposed indenture of assignment was not the deed of the defendant.

Thirdly, that, at the times respectively when the said rents or sums of 106*l.* 11*s.* 3*d.*, 106*l.* 11*s.* 3*d.*, and 111*l.* 18*s.* 4*d.*, or any or either of them, or any part thereof, became due, the defendant was not in possession or receipt of the said rents, produce, or profits of the said premises by the said indenture of assignment assigned, under the said trusts therein contained, in manner and form as in the declaration alleged.

Fourthly, as to so much and such part of the declaration as related to the non-payment of the said rents or sums of 106*l.* 11*s.* 3*d.*, and 106*l.* 6*s.* 3*d.*, and 111*l.* 18*s.* 4*d.*,—that, after the accruing of the causes of action in the declaration mentioned in respect thereof, and before the commencement of this suit, to wit, on the 1st of January, 1847, and on divers other days and times afterwards, he (the defendant) paid to the plaintiff, and the plaintiff then accepted and received of the defendant, divers sums of money amounting, to wit, to all the moneys in the declaration mentioned, in full satisfaction and discharge of the said damages and causes of action in the declaration mentioned, so far as they relate to the said non-payment of the said rents or sums in the introductory part of this plea mentioned.

Fifthly, as to so much and such part of the said declaration as related to the defendant's not having kept harmless and indemnified the plaintiff in manner *and form as therein alleged,—that he, the defendant, *300] *did* keep harmless and indemnify the plaintiff against the said rents or sums of 106*l.* 11*s.* 3*d.*, 106*l.* 11*s.* 3*d.*, and 111*l.* 18*s.* 4*d.*, and of, from, and against the said costs, charges, damages, and expenses by the plaintiff sustained as aforesaid, according to the defendant's covenants, &c.

Sixthly, as to the causes of action in the introductory part of the third plea mentioned,—that the plaintiff did not pay the said moneys, or any

of them, or any part thereof, nor was the plaintiff put to, nor did he sustain, the said costs, charges, and expenses, or any of them, or any part thereof, in manner and form as in the declaration alleged.

These pleas all concluded to the country, and the plaintiff joined issue upon them.

At the trial, before ERLE, J., at the summer assizes at Monmouth, in 1847, a verdict was taken for the defendant on the third issue, and for the plaintiff on all the others; leave being reserved to the plaintiff to move that the judgment might be entered for him for 266*l.* 10*s.*, if the court should be of opinion that the plaintiff was entitled to judgment, notwithstanding the verdict, on the third issue.

Talfourd, Serjt., in Michaelmas term, 1847, obtained a rule nisi accordingly.

Whateley and Sir *T. Phillips* showed cause at the sittings *in banco* after last Trinity term. It is clear from the terms of the covenant, that the liability of the defendant under the covenant to indemnify, was, like the covenant for payment of the rent and galeages, to be limited to the time during which he should be "in possession or receipt of the rents, produce, and profit of the premises thereby assigned: *Sugden's Vendors and *Purchasers*, 11th edit. Vol. II., ch. 13, § 3; ch. 14, § 2. In *Brown- ing v. Wright*, 2 Bos. & Pull. 13, A., after granting certain pre- [*301
mises in fee to B., and after warranting the same against himself and his heirs, covenanted, that, notwithstanding any act by him done to the contrary, he was seised of the premises in fee, *and that he had full power, &c., to convey* the same; he then covenanted, for himself, his heirs, executors, and administrators, to make a cart-way, and that B. should quietly enjoy without interruption from himself, or any person claiming under him; and, lastly, that he, his heirs and assigns, and all persons claiming under him, should make further assurance: it was held, that the intervening general words, "full power, &c., to convey," were either part of the preceding special covenant, or, if not, that they were qualified by all the other special covenants against the acts of himself and his heirs. So, in *Foord v. Wilson*, 8 Taunt. 543, the assignor of a term covenanted that he had not at any time done any act whereby the premises assigned could be encumbered; and that, notwithstanding any such act, the lease was a good and subsisting lease, *and that* the defendant, at the time of executing the assignment, had in himself good right to assign the premises *in manner aforesaid*: it was held, that the covenant that the assignor had good right to assign, was qualified and restrained to his own acts only. In *Nind v. Marshall*, 1 Brod. & Bingh. 319, the assignor of a lease covenanted for quiet enjoyment during the term, "without the lawful let, suit, interruption, &c., of J. M., his executors, administrators, or assigns, or any of them, or any other person or persons whomsoever having or claiming any estate, or right in the premises, and that free and clear, and freely and clearly discharged, or otherwise by J. M., his heirs,

*802] *executors, or administrators, defended, kept harmless, and indemnified from all former gifts, grants, bargains, sales, leases, mortgages, assignments, rents and arrears of rents, statutes, judgments, recognisances, made or suffered by J. M., or by their or either of their acts, means, default, procurement, consent, or privity," preceded by a covenant that the lease was a good lease, notwithstanding any act of J. M., and followed by a covenant for further assurance by J. M., his executors, administrators, and all persons whomsoever claiming, during the residue of the term, any estate in the premises under him or them: it was held, by DALLAS, C. J., BURROUGH, J., and RICHARDSON, J.,—PARK, J., *dissentiente*,—that the covenant for quiet enjoyment extended only against the acts of the covenantor and those claiming under him, and not against the acts of all the world. "In this," says DALLAS, C. J. (2 J. B. Moore, 735, 1 Brod. & Bingh. 345), "as in every similar case, it is a question of intention, to be collected, not merely from the words of any one covenant, but by comparing all the covenants, each with the other, so that the construction be made on the entire deed; and this, without reference to the order in which the covenants are found." And, after reviewing the authorities that were cited, and referring to the particular language of the covenants, he concludes (1 Brod. & Bingh. 348, 349; J. B. Moore, 739),—"On the whole, therefore, when I find the deed begin and end with a restrictive covenant, when I find intermediate restrictive covenants, when I find in the very clause in which the supposed general covenant occurs, that it is immediately preceded by a restrictive covenant; when I further find, that, to suppose the general words were added to enlarge the restrictive words, would be inconsistent *803] with special restraining words which *immediately follow, and would give them a sense different from what they bear in a subsequent covenant: putting all these circumstances together, and having to assign a meaning to the general words, not merely by themselves, nor even as they follow special words, but as they themselves are, in every subsequent covenant, followed by restrictive words; if there were more of difficulty in this case than appears to me to belong to it, still, on the whole, I should be of opinion that the general intention is clear; and, in favour of a clear intention, that is, such intention to be collected from the whole deed, I should consider that these words might even be rejected, if necessary. But this I do not see any necessity to do, because I think 'all persons whatsoever' must be construed to mean persons of the description in the other covenants, that is, persons claiming under the covenantor, or persons claiming under them; and that they are in the nature of sweeping and comprehensive words, introduced to give the largest effect to the special words, reference being had to their special nature, and, as such, ranging under known rules of construction, and to be explained and applied as I have already stated." Putting, therefore, a reasonable construction upon this covenant, it is clear, that, if not

limited in express terms to the defendant's possession, the covenant, in its nature, is one that could only enure during the continuance of the estate.

At all events, the plaintiff is not entitled to judgment *non obstante veredicto*. In *Pitts v. Polehampton*, 1 Ld. Raym. 390, Lord HOLT lays it down, that, "where the defendant's plea confesses the duty demanded by the plaintiff, and does not avoid it sufficiently, if the issue be immaterial, and found for the plaintiff, he shall have judgment; but, if the defendant's plea goes in discharge of the action, and issue is taken immaterially, and verdict for *the plaintiff, a repleader shall be granted." [*304 And in *Lambert v. Taylor*, 4 B. & C. 138, 6 D. & R. 188, ABBOTT, C. J., says: "The question whether the plaintiff can have judgment, or whether there ought to be a repleader, depends upon the question whether the plea does or does not contain a confession of a cause of action: if a cause of action be confessed by the plea, and the matter pleaded in avoidance be insufficient, the plaintiff is entitled to judgment, notwithstanding the verdict: if the plea does not confess a cause of action, there must be a repleader." In *Goodburne v. Bowman*, 2 M. & Scott, 706, TINDAL, C. J., suggests that the cases establish, that, "if the plea does not confess a cause of action, and does contain a sufficient avoidance, it is bad, and a repleader must be awarded." It is true that was not essential to the decision of that case. In *Plummer v. Lee*, 2 M. & W. 495, 5 Dowl. P. C. 755, which was an action of debt on an award, by an administratrix, the declaration stated, that, on the 12th of July, 1833, a settlement of part of the accounts took place between the deceased and the defendant; it then stated a submission to arbitration by the plaintiff, as administratrix, and the defendant, and an award: the first plea traversed the making of the award; the second traversed that the settlement took place on the day mentioned in the declaration; the third traversed the making of such settlement at any time: on the trial, the plaintiff had a verdict on the first and third issues, and the defendant on the second: and, after argument, and time taken to consider, the court held that the second plea did not contain any confession, and that judgment *non obstante veredicto* could not be given, but awarded a repleader. In *Gwynne v. Burnell*, 6 N. C. 453, 1 Scott, N. R. 711, (a) the House of Lords would *have awarded a repleader, upon the authority [*305 of the cases above cited, if it had been competent to a court of error so to do. (b) In *Negelen v. Mitchell*, 7 M. & W. 612, the plea confessed but did not avoid. In 2 Wms. Saunders, 319 d, n. (h), it is said, that, "where a plea is good in form, though not in fact, or, in other words, if it contain a defective title or ground of defence, by which it is apparent to the court, upon the defendant's own showing, that, in any way of putting it, he can have no merits, and the issue joined thereon

(a) Cited 1 M. & G. 939; 5 M. & G. 674; 2 Mann. Gr. & S. 444, 3 Id. 492, 6 Id. 289.

(b) See 2 Wms. Saund. 319 b, n. (e).

be found for him, then, as the awarding of a repleader would not mend the case, the court, for the sake of the plaintiff, will at once give judgment *non obstante veredicto*; but, where the defect is not so much in the title, as in the manner of stating it, and the issue joined thereon is immaterial, so that the court know not for whom to give judgment, whether for the plaintiff or defendant, there, for their own sake, they will award a repleader." [MAULE, J. As the plaintiff was wrong in alleging an immaterial fact, and the defendant was wrong in traversing it, the latter ought not to be permitted to stand in the same beneficial position as he would have been in if he had demurred, as he ought to have done.] The reason is well given in *Staples v. Heydon*, 2 Ld. Raym. 924, 6 Mod. 10, 2 Salk. 579, 3 Salk. 121, where Lord HOLT says: "Where the defendant confesses a trespass, and avoids it by such a matter as can never be made good by any sort of plea, there, in such a case, judgment shall be given upon the confession, without regard to the finding upon an immaterial issue. But, where the matter of the justification is such a matter as, if it were well pleaded, would be a good justification, there, though *306] it be ill pleaded, yet that shall not *be taken to be a confession of the plaintiff's action. And the books do all of them, if they be narrowly looked into, turn upon this difference,—where the confession is full, and the matter of the plea is ill in substance."

Talfourd, Serjt., and *Dowdeswell*, in support of the rule. If this had been the case of a mortgage, with a power to enter for non-payment of the mortgage-money or interest, it might have been reasonable that the covenant to indemnify should be limited to the period of the covenantor's enjoyment of the property. This, however, is the case of an absolute sale: and, what is there unreasonable in a covenant to indemnify during the continuance of the lease? The construction contended for on the other side, would expunge the words "at all times thereafter," which certainly are not idle. [MAULE, J. If those words had not been there, the covenant to indemnify would only have been during the defendant's possession, which would not have been sufficient.] The plaintiff is clearly entitled to judgment *non obstante veredicto*. The case falls precisely within the rule laid down in *Negelen v. Mitchell*, that, where there are several pleas upon the record, if one of them traverse immaterial matter in the declaration, and the defendant has pleaded other material matters, which have been disposed of on proper issues, the court will not grant a repleader. That case overrules *Plummer v. Lee*. Here, the defendant has traversed every material allegation in the declaration, and all the issues thereon are found against him. The reason for a repleader, therefore, ceases to exist. Besides, a repleader is never awarded in favour of the party who makes the first default. [COLTMAN, J. That is confined to the case of the issue being found for the party.] The court *307] may, it seems, mould the rule, and, although judgment *non obstante*

veredicto only is asked for, they may award a repleader, if they see fit: *Filleul v. Armstrong*, 7 Ad. & E. 557, 2 Nev. & P. 406.

Cur. adv. vult.

COLTMAN, J., now delivered the judgment of the court.

After stating the pleadings, the learned judge proceeded as follows:—

At the trial, the verdict was entered for the defendant, on the issue joined on the third plea, and for the plaintiff, on the other issues; and leave was reserved for judgment to be entered for the plaintiff for the sum of 266*l.* 10*s.*, if the court should be of opinion that the plaintiff is entitled to judgment notwithstanding the verdict on the third plea.

On the argument before us, it was insisted, on the part of the defendant, that the defendant was only bound to pay the rents and galeages, and to perform the covenants, during such time as he should be in possession; and that the covenant to indemnify must be construed with a similar restriction; for, that it could not be supposed that the defendant would agree to indemnify the plaintiff against the breach of any other covenants than those which he had undertaken to perform; and, as he only undertook to perform the covenants during such time as he should be in possession, it could not be the intention that he should be bound to indemnify against the breach of any other covenants than such as were to be performed during the time he was in possession.

But we think the covenant to indemnify is not to be so restricted. At the time the deed was executed, it was probably in contemplation of the parties that the defendant would pay the stipulated price of 1575*l.*, and *remain in possession of the colliery: and, under that expectation, [*308 it was of course that the defendant should enter into a covenant to pay the rents and perform the covenants during the time that he should be in possession: but the parties must also be taken to have had in their contemplation the possibility of the defendant's making default in paying the stipulated sum, and of the colliery's being sold by Reid under the trusts of the deed. On such a sale taking place, it was to be expected that covenants would be entered into by the purchaser, to perform the covenants of the original lease. But, the purchaser might make default in performing them: and it was, therefore, reasonable that the plaintiff should require from the defendant a covenant to indemnify him against any breach of the covenants of the original lease after the sale: nor could the defendant reasonably object, as it would be only in consequence of his own default that a sale would take place. And, if we look at the terms of the covenants entered into by the defendant, they are quite consistent with this view of the case; the first covenant being, that the defendant would at all times, so long as he should be in possession, pay the rents, &c.; the latter covenant being without restriction, that he would at *all times* indemnify, that is to say, whether in possession or not.

Such being, in our opinion, the true construction of the covenants, the

question arises, whether the third plea furnishes any defence to the action.

It appears by the declaration, that the assignment to Reid, as trustee, was made on the 1st of January, 1840, and that the sums on which the question arises became payable after the assignment. It is also alleged in the declaration, that those sums became payable during the time the defendant was in possession. The payment of the sums in question is alleged to have been afterwards (that is, after they had become due and *309] payable) made *by the plaintiff; but it is not alleged to have been made whilst the defendant was in possession.

The plea does not deny that the sums in question became due to Elizabeth Watkins after the assignment to Reid, but denies only that the defendant was in possession or receipt of the rents, when those sums became payable. Now, as far as the covenant to pay the rents is concerned, such a plea appears to be a sufficient answer; for, the defendant is only bound to pay the rents whilst in possession. But it is no answer to the covenant to indemnify; it being immaterial, with reference to that covenant, whether the defendant was in possession or not. The plea, therefore, which professes to answer the whole declaration, does, in fact, leave a material part of the declaration unanswered; and the issue raised by it, is, with reference to the decision of this cause on the whole record, an immaterial issue.

The next question is, whether the plaintiff is entitled to judgment *non obstante veredicto*, or whether there should be a repleader: and it appears to us that there is no occasion for a repleader. The case falls within the reason of the rule laid down by the court of Exchequer in *Negelen v. Mitchell*, 7 M. & W. 612, that, if one of several pleas traverses immaterial matter in the declaration, and the defendant pleads other material matters, which are disposed of on proper issues raised upon them, the reason for a repleader ceases.

We therefore think, that, in this case, there should be judgment for the plaintiff *non obstante veredicto*. Judgment accordingly.

*310] *YOUNG and Another v. RAINCOCK. Feb. 14.

On the sale of a messuage, &c., the vendor,—by a deed, reciting that his wife was the heir of A. H., deceased, that A. H. had died intestate, and that the vendor and his wife, or one of them, were or was seised in fee, and after further reciting a settlement made on the marriage of the vendor and his wife, giving them a power of appointment, the power was executed in favour of H. S. Y. in fee,—covenanted “that for and notwithstanding any act, matter, or thing by them the vendor and his wife, or either of them, or the said A. H., made, done, &c., to the contrary,” they, the vendor and his wife, or one of them, were or was lawfully and rightfully seised of the messuage, &c., and had lawful and absolute authority to appoint, &c., and that it should be lawful for H. S. Y., his heirs, &c., peaceably and quietly to hold the messuage, &c., without any lawful let, suit, &c., by them the vendor and his wife, or either of them, their or either of their heirs, &c., or from or by any other person or persons whomsoever lawfully or equitably claiming

or to claim by, from, or under, or in trust for him, them, or either of them, or the said A. H.; and that, free and clear, &c., of, from, and against all gifts, grants, encumbrances, &c., already or thereafter to be had and made, &c., by the vendor and his wife, or either of them, or the said A. H. deceased, or by any other person or persons lawfully or equitably claiming or to claim by, from, or under, or in trust for them, or any or either of them, or by their or any or either of their acts, deeds, means, defaults, or procurement.

The declaration, in an action by the executors of the covenantee, after setting out the covenant for quiet enjoyment, assigned a breach of that covenant as follows:—"that the said H. S. Y., during his lifetime, was not permitted, nor was he able, peaceably and quietly to hold the said messuage, &c., without the lawful let, &c., of the defendant and his wife, and of, from, and by all other persons whomsoever, lawfully and equitably claiming and to claim by, from, and under, and in trust for him and them and the said A. H. deceased; but, on the contrary thereof, after the making of the indenture, and during the lifetime of the said H. S. Y., one P. H., who then claimed, and from thence hitherto hath claimed, and still doth claim from, under, and as heir-at-law to the said A. H. deceased, lawful right and title to the said messuage, &c., caused a declaration in ejectment to be served on the said H. S. Y." The declaration then set out a recovery in ejectment by P. H., claiming as above, and an eviction of the said H. S. Y. by due process of law.

To this declaration, the defendant pleaded, *inter alia*, that A. H. died intestate, leaving the defendant's wife her only child and heir-at-law, and that the said H. S. Y., intending, &c., instigated P. H. to claim right and title to the messuage, and to bring ejectment; and so the defendant said that the said H. S. Y., of his own wrong, and by and through his own act and procurement, was evicted, &c.

The plaintiffs replied *de injuria* :—

Held,—first, that, assuming that the recital in the deed—that the vendor's wife was heir of A. H.—would have operated as an estoppel against the plaintiff's testator, after eviction by title paramount, if properly pleaded and relied upon, such estoppel was waived by joining issue upon a replication which put in issue the fact of the wife's heirship alleged in the plea, instead of rejoining the estoppel:

Secondly, that, excluding such allegation of the heirship of the defendant's wife, the plea afforded no answer to the action:

Thirdly, that the allegation in the declaration that P. H. claimed, as heir to A. H., lawful title to the premises, though possibly objectionable on special demurrer, on the ground of uncertainty, must, after being pleaded over to, be understood to mean, not merely that he claimed, but that he had lawful title:

Fourthly, that the generality of the terms of the covenant for quiet enjoyment was not restricted by the introductory words,—for and notwithstanding, &c.,—of the covenant for title.

THIS was an action for the breach of a covenant for quiet enjoyment. The cause was tried before PATTESON, J., at the *Suffolk summer [311 assizes, 1847. The plaintiffs were the executors of one Henry Shadow Young, who died in 1846. The defendant, in 1832, married Martha Ann, the only child of Ann Hopley, who purchased a small estate, consisting of the house and premises which were the subject of the present action, and died intestate (as to this estate) in 1827. Martha Ann Hopley, her only child, then entered into possession.

In 1841, the defendant and Martha Ann his wife sold and conveyed the estate to Henry Shadow Young, who entered into possession thereof.

In 1845, one Peter Hopley, who claimed to be the heir of the said Ann Hopley, brought an action of ejectment against Henry Shadow Young, and obtained possession of the premises. Henry Shadow Young was evicted, and the present action was brought for a breach of the covenant for quiet enjoyment in the deed of conveyance on the sale in 1841.

The deed on which the action was brought was set out on oyer. By that deed,—after reciting a grant to Ann Hopley, in fee, and that the

defendant's wife was the heir of Ann Hopley, deceased, and that Ann Hopley had died intestate, and that M. A. Raincock was seised in fee ;
*312] and after further reciting a settlement made *on the marriage of the defendant and his wife, giving them a power of appointment,—the power was executed in favour of H. S. Young, in fee ; and the defendant covenanted as follows :—“That, for and notwithstanding any act, matter, or thing by them, the said G. D. Raincock and Martha Ann, his wife, or either of them, or the said Ann Hopley, deceased, made, done, omitted, committed, executed, or knowingly or willingly suffered to the contrary, they the said G. D. Raincock, and Martha Ann, his wife, or one of them, are or is at the time of the sealing and delivery hereof, lawfully, rightfully, or absolutely seised of and in, or well and sufficiently entitled to, the said messuage or tenement, land, hereditaments, and premises hereby appointed, granted, and released, or intended so to be, and every part thereof, with their and every of their appurtenances, for a good, sure, perfect, absolute, and indefeasible estate of inheritance in fee-simple in possession, without any manner of condition, trust, power of revocation, equity of redemption, remainder, or limitation of any use or uses, or restraint, cause, matter, or thing whatsoever, to alter, change, defeat, encumber, revoke, or make void the same ; and that, for and notwithstanding any such act, deed, matter, or thing as aforesaid, they, the said G. D. Raincock and Martha Ann, his wife, some or one of them, now have or hath good right, full power, and lawful and absolute authority to appoint, grant, bargain, sell, release, and convey the said messuage or tenement, land, hereditaments, and premises hereby appointed, granted, and released, or intended so to be, with their appurtenances, To the uses, upon the trusts, and for the intents and purposes hereinbefore expressed and declared, and in manner aforesaid, and according to the true intent and meaning of these presents ; and that it shall and may
*313] be lawful to and for the said Henry Shadow Young, *his heirs, appointees, and assigns, from time to time, and at all times hereafter, peaceably and quietly to enter into, hold, occupy, possess, and enjoy the said messuage or tenement, land, hereditaments, and premises hereby appointed, granted, and released, or intended so to be, with their appurtenances, and to have, receive, and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their own use and benefit, without any lawful let, suit, trouble, denial, claim, demand, interruption, or eviction whatsoever of or by them the said G. D. Raincock and Martha Ann his wife, or either of them, their or either of their heirs, executors, administrators, or assigns, or of, from, or by any other person or persons whomsoever lawfully or equitably claiming or to claim by, from, or under, or in trust for him, them, or either of them, of the said Ann Hopley, deceased ; and that free and clear, and freely and clearly and absolutely acquitted, exonerated, released, and for ever discharged or otherwise by the said G. D. Raincock and Martha Ann, his wife, their

heirs, executors, and administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all and all manner of former and other gifts, grants, bargains, sales, dowers, and all rights and titles to dower, uses, trusts, entails, wills, mortgages, leases, statutes-merchant, or of the staple, recognisances, judgments, executions, extents, rents, arrears of rent, annuities, legacies, sums of money, yearly payments, forfeitures, re-entry, debts of record, debts due to the Queen's Majesty, and of, from, and against all other estates, titles, troubles, charges, debts, and encumbrances whatsoever, either already or hereafter to be had and made, executed, occasioned, and suffered by the said G. D. Raincock and Martha Ann, his wife, or either of them, or the said Ann Hopley, deceased, or by any other person or persons lawfully *or equitably claiming or to claim by, from, or under, or in trust [*314 for them or any or either of them, or by their or any or either of their acts, deeds, means, defaults, or procurements: and, further, that they, the said G. D. Raincock and Martha Ann, his wife, and their heirs, executors, and administrators, and all and every other person or persons having or claiming, or who shall or may hereafter have or claim any estate, right, title, interest, inheritance, use, trust, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said messuage or tenement, land, hereditaments, and premises hereby appointed, granted, and released, or intended so to be, with their appurtenances, or any of them, or any part thereof, by, from, or under, or in trust for them the said G. D. Raincock and Martha Ann, his wife, or either of them, or the said Ann Hopley, deceased, shall and will, from time to time, and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges of the said Henry Shadow Young, his heirs, appointees, or assigns, make, do, acknowledge, execute, and perfect, or cause or procure to be made, done, acknowledged, executed, or perfected, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely appointing, granting, conveying, and assuring of the said messuage or tenement, land, hereditaments, and premises hereby appointed, granted, and released, or intended so to be, and every part thereof, with their appurtenances, unto the said Henry Shadow Young and his heirs, to the uses, upon the trusts, and for the intents and purposes hereinbefore declared or expressed concerning the same, or to the use of such other person or persons, and in such other manner and form as he the said Henry Shadow Young, his heirs, appointees, or *assigns, or his or their counsel in the law shall [*315 advise and require, and prepare and tender to be made, done, and executed.

The declaration, after setting out the covenant for quiet enjoyment, alleged for a breach, that Henry Shadow Young, during his lifetime, was not permitted, nor was he able, from time to time, and at all times there-

after, peaceably and quietly to hold, occupy, possess, or enjoy the said hereditaments and premises, nor was he permitted, nor was he able, to have and receive the rents, &c., without the lawful let, suit, trouble, &c., of the defendant and Martha Ann, his wife, and of, from, and by all other persons whomsoever lawfully and equitably claiming and to claim by, from, and under and in trust for him and them and the said Ann Hopley, deceased; but, on the contrary thereof, after the making of the said indenture, and during the lifetime of the said Henry Shadow Young, one Peter Hopley, who then claimed, and from thence hitherto hath claimed, and still doth claim, from, under, and as heir-at-law to the said Ann Hopley, deceased, lawful right and title to the said messuage or tenement, caused a declaration in ejectment to be served on Henry Shadow Young, &c. The declaration then set out a recovery in ejectment by Peter Hopley, claiming as above mentioned, and an eviction by due process of law of Henry Shadow Young.

To this declaration, the defendant pleaded, that Ann Hopley died on the 5th of December, 1827, intestate as to her real estate, leaving Martha Ann Raincock, her only child and heir-at-law; that Henry Shadow Young, intending to harass and injure the plaintiff, procured, instigated, and stirred up Peter Hopley to claim right and title to the said messuage, &c., and to commence and prosecute the action of ejectment; and that Peter Hopley did, in consequence of such procurement, make the said *316] claim, and commence and prosecute the said *action of ejectment; and so the defendant said that the said Henry Shadow Young, of his own wrong, and by and through his own act and procurement, was interrupted and evicted from the peaceable and quiet possession of the said messuage, &c.

To this plea the plaintiff replied *de injurid*.

There were other pleas, to which, however, it is unnecessary to advert in detail, as they did not substantially differ from the above.

The cause was tried before PATTESON, J., at the Suffolk summer assizes, 1847, when it was contended, on the part of the defendant, that the recital in the deed of 1841, that Martha Ann Raincock was the heir of Ann Hopley, deceased, was conclusive evidence of the fact.

The learned judge was of opinion, that, if evidence at all, the recital was not conclusive evidence of that fact; and, the other evidence that was given in the cause having established, to the satisfaction of the jury, that Martha Ann Raincock was illegitimate, a verdict was, by his direction, found for the plaintiff.

Prendergast, in Michaelmas term, 1847, obtained a rule nisi for a new trial, on the ground of misdirection, or to arrest the judgment. He referred to *Rees d. Chamberlain v. Lloyd*, *Wightwick*, 121, *Bowman v. Taylor*, 2 Ad. & E. 278, *Lampon v. Corke*, 5 B. & Ald. 606, Co. Litt. 47 b, *Stephen on Pleading*, 5th edit. p. 227, *Browning v. Wright*, 2 B. & P. 13, *Hosier v. Searle*, 2 B. & P. 299, and *Payler v. Homersham*, 4

M. & Selw. 423. [WILDE, C. J., referred to Hayne v. Maltby, 3 T. R. 438, and Lainson v. Tremere, 1 Ad. & E. 792, 3 N. & M. 603.]

**Biggs Andrews, O'Malley, and Worllege*, in Trinity term last [317 showed cause. The facts are simple. The covenant upon which the question arises, is the usual covenant for quiet enjoyment in a case where the vendor comes in as heir-at-law of a deceased person. The third plea states that Ann Hopley died intestate (as to her real estate) on the 5th of December, 1827, leaving Martha Ann Raincock her *only child and heir-at-law*, that Henry Shadow Young procured one Peter Hopley to claim title to the messuage, that Peter Hopley did make claim, and that so the said Henry Shadow Young was evicted by his own act and procurement. It was proved that Peter Hopley, claiming as heir-at-law of the deceased Ann Hopley, brought ejectment, and recovered possession of the premises from Henry Shadow Young, the vendee. The principal question is, whether the recital in the purchase deed,—that Martha Ann Raincock was the *heir* of Ann Hopley, operated to estop the plaintiffs from saying that any one else was her heir-at-law. It is submitted that it did not. The deed contains an express covenant for quiet enjoyment, and for freedom from eviction by Raincock and his wife, their or either of their executors and administrators, or by any other person or persons whomsoever, lawfully or equitably claiming or to claim by, from, or under, or in trust for him, them, or either of them, “or the said Ann Hopley, deceased.” In Co. Litt. 352 a, it is said “*Estoppe* cometh of the French word *estoupe*, from whence the English word *stopped*: and it is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.” In Viner's Abridgment, tit. *Estoppel* (M), No. 11, pl. 8, the following case is put:—If A. S., reciting by her deed that she is *feme covert* (and in truth she is a *feme sole*), grants an annuity, *&c., it [318 is a good grant, for that is but a *void recital*, and the grantee need not put that in his writ, and that cannot be a conclusion to him when he shows the deed.(a) But, if *feme covert*, reciting by her deed that she is a *feme sole*, grants an annuity, this is a void grant, for, she shall not be concluded by this recital, &c.”(b) Again,(c) “Indenture between lord and tenant, reciting that the tenant held of the lord *by homage, fealty, and 10s. rent*, the lord confirms his estate *salvo antiquo dominio et servitio*; and it was held, that, though it was indented, and both sealed, yet, because it is a recital, and all the words of the lord only, therefore it shall not *estop* the tenant to plead *hors de son fee*.”(d) In Doe d. Pritchard v. Dodd, 2 N. & M. 838, it was held, that, where a party to a conveyance is therein described as heir-at-law of J. P., a *surviving*

(a) Perk. § 40; citing 3 E. 3 Itin. Not. Esto. 132, Fitz. Abr. tit. *Estoppel*, pl. 132.

(b) Perk. § 41.

(c) Tit. *Recital* (A), pl. 2.

(d) Citing Brooke's Abridgment, title *Faits*, § l. 4, which cites 35 H. 6, fo. 34 (M. 35 H. 6, fo. 34 A. pl. 41).

devisee of the legal estate, such description is not evidence of the prior death of the co-devisees, or that such party is heir of J. P., even against another party who executed the conveyance. TAUNTON, J., there said: "I think the mere description of Oldham as heir of the surviving trustee, is insufficient, without extrinsic evidence that the description is true. The rule is, that a recital shall not be evidence *for* the party making the recital, though it may be so against him." If that be correct, there would be no misdirection here, even if the learned judge had told the jury that the recital in the deed of 1841 was no evidence at all, against the plaintiffs, of the truth of the matter therein stated. In *Bowman v. Taylor*, 2 Ad. & E. 278, the matter recited was the very foundation of the obligation entered into. Lord DENMAN there *319] *says: "The doctrine of estoppel has been guarded with great strictness; not because the party enforcing it necessarily wishes to exclude the truth, for, it is rather to be supposed that that is true which the opposite party has already recited under his hand and seal; but because the estoppel *may* exclude the truth. However, it is right that the construction of that which is to create an estoppel, should be very strict." [CRESSWELL, J. The recital there was, that the plaintiff was entitled to that which he professed to grant. That is very like a recital that the vendor has title to that which he professes to convey.] In *Jarman's Conveyancing*, (a) it is said: "The doctrine of estoppel, if carried strictly out, would seem to require, that the grantee should not, in an action on the indenture, be permitted to allege that it did not operate according to its purport. But, if this were so, an action could scarcely be brought in any case upon the covenants for title in a conveyance; for, if the deed purported to confer a good title, and therefore did not disclose any defect, the grantee would be estopped from alleging a defect, and, though evicted, must necessarily admit that the eviction was unlawful, and therefore not within the covenants; and the case of *Noke v. Awder*, Cro. Eliz. 373, 436, *Awder v. Nokes*, F. Moore, 419, seems to have been founded too much on this notion. The proper way of regarding the matter appears to be, that statements by deed are estoppels only *quoad* the purpose for which they are made, and so may estop for one purpose, and not for another: *Gaunt v. Wainman*, 3 N. C. 69, 3 Scott, 413: therefore, the recital of the grantor's title shall not estop him and his assigns from denying that he then could convey, because it is made with a *320] view to conveyance; and, for *the same reason, it shall estop the grantee, so long as he is not ousted, from asserting a want of title in his grantor as an excuse for not performing his part of the compact. But, *quoad* the covenants for title, the recital of title is obviously immaterial, or, rather, may be said to be contingently inconsistent with them, and, so far only as may be necessary for their operating, to be set loose by them."

To operate as a bar, the estoppel must be pleaded. In *Trevivan v. Lawrence*, 1 Salk. 276, 2 Ld. Raym. 1036, 6 Mod. 256, (a) the court took this difference, "that, where the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel; for here is a title in the plaintiff, that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but, if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel; for, then they are to find the truth of the fact which is against him. Thus, in debt, for rent on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence that the plaintiff had nothing in the tenements; because, if he had pleaded that specially, the plaintiff might have replied the indenture, and estopped him; but, if the defendant plead *nil habuit*, &c., and the plaintiff will not rely on the estoppel, but reply *habuit*, &c., he waives the estoppel, and leaves it at large, and the jury shall find the truth notwithstanding his indenture." In *Bowman v. Rostrow*, 4 Nev. & M. 557, 2 Ad. & E. 295 (b), the declaration stated the execution of a deed by the plaintiff and defendant; the plea did not traverse the execution, but alleged new matter, upon which the replication took issue; the deed was put in at the trial, and its recital directly contradicted the new matter alleged in the plea; it was held, nevertheless, that the defendant was not precluded from submitting such matter of defence to the jury, inasmuch as the plaintiff had not pleaded the recital of the deed by way of estoppel. So, in *Magrath v. Hardy*, 4 N. C. 782, 6 Scott, 627, to an action for money had and received, the defendant pleaded a recovery by foreign attachment at the suit of a creditor of plaintiff's, and that the creditor had execution of the sum recovered, according to the custom of London; and the plaintiff replied that no execution was executed; upon which the defendant joined issue: it was held that, having joined issue on the fact of the execution, the jury were not estopped, by a record of satisfaction in the foreign attachment, from finding according to the fact. In *Hill v. The Manchester and Salford Waterworks Company*, 2 B. & Ad. 544, an obligor sued on a bond reciting a certain consideration, was held to be estopped from pleading that the consideration was different, unless he could make it appear by his plea that the real transaction was fraudulent or unlawful. The principle upon which this doctrine rests, is well laid down by PARKE, B., in *Carpenter v. Buller*, 8 M. & W. 209. "If a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound, to deny the recital, (b) notwithstanding what Lord COKE

(a) Cited in 10 Vin. Abr. title *Estoppel* (L. 2, pl. 4, in marg., Com. Dig. title *Estoppel* (C).

(b) See *Rainsford v. Smith*, Dyer, 196 a, and cases in notes.

says on the matter of recital, in Co. Litt. 352 b ; and a recital in instruments not under seal, may be such as to be conclusive to the *322] *same extent. A strong instance as to recitals in a deed, is found in the case of *Lainson v. Tremere*, where, in a bond to secure the payment of rent under a lease stated, it was recited that the lease was at a rent of 170*l.* ; and the defendant was estopped from pleading that it was 140*l.* only, and that such amount had been paid. So, where other *particular* facts are mentioned in a condition to a bond, as that the obligor and his wife should appear, the obligor cannot plead that he appeared himself, and deny that he is married, in an action on the bond. (a) All the instances given in Comyns's Digest, title, *Estoppel*, (A. 2), under the head of 'Estoppel by matter of writing' (except one, which relates to a release), are cases of estoppel in actions on the instrument in which the admissions are contained. By his contract in the instrument itself, a party is assuredly bound, and must fulfil it. But there is no authority to show that a party to the instrument would be estopped, in an action by the other party, not founded on the deed, and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence ; for instance, in another suit, though between the same parties, where a question should arise whether the plaintiff held at a rent of 170*l.*, in the one case, or was married, in the other case, it could not be held that the recitals in the bond were conclusive evidence of these facts. Still less would matter alleged in the instrument, wholly immaterial to the contract therein contained ; as, for instance, suppose an indenture or bond to contain an unnecessary description of one of the parties as assignee of a bankrupt, overseer of the poor, or as filling any other character, it could not be contended that such statement would be conclusive on the other party, in any other *323] *proceeding between them." In 1 Wms. Saund. 325 a, n. (d), it is said that "the rule appears to be general, with respect to estoppels by deed, that the estoppel must be pleaded *if there be an opportunity* ; otherwise, the party omitting to plead it waives the estoppel, and the jury must find the truth." (b) In *Bensley v. Burdon*, 2 Sim. & Stu. 519, Sir JOHN LEACH, V. C., says : "Where by deed indented a man represents himself as the owner of an estate, and affects to convey it for valuable consideration, having at the time no possession or interest in the estate, and when nothing therefore can pass, whatever be the nature of the conveyance, there, if by any means he afterwards acquire an interest in the estate, he is estopped, in respect of the solemnity of the instrument, from saying, as against the other party to the indenture, contrary to his averment in that indenture, that he had not such interest at the time of its execution." In *Edwards v. Brown*, 3 Y. & J. 423, A.,

(a) 1 Roll. Abr. 873, l. 25 ; *Payne v. Skeltrom* (translated, 10 Vin. Abr. 467, pl. 13), *Style*, 17 Ayleyn, 13.

(b) See 2 Smith's Leading Cases, 457 ; *Wilson v. Butler*, 4 N. C. 748, 6 Scott, 540.

with B. & C. his sureties, entered into a bond to D., the condition of which, after reciting that A. was seised in tail of an estate of which he had covenanted to suffer a recovery at a future day, to enure to the use of D. in fee, was, that the bond should be void, if the recovery should be suffered "so and in such manner as that, under and by virtue thereof, the estate should be vested in D. for ever:" the recovery was duly suffered, but, A. being seised for life only, D. brought an action upon the bond, to which one of the sureties pleaded, that, if A. had been seised in tail, the recovery was suffered so as to vest the estate in D. in fee: it was held that this plea was bad, because the recital in the condition did not estop D. from disputing that A. was seised in tail, or release the surety from his obligation, it being the intention of the parties that *D. should have an estate in fee. In *Lady Cavan v. Pulteney*, [*324 2 Ves. Jun. 544, where the lessor, reciting that he was seised of an estate of freehold and inheritance in the estate, covenanted for quiet enjoyment against himself, his heirs, &c., or any other person or persons lawfully claiming by, from, or under him, &c., or by or through his, their, or any of their acts, means, *default*, or procurement: the lessees were evicted by the remainderman under a settlement, and it appeared that the lessor could have obtained the fee-simple by suffering a recovery. Lord ROSSLYN considered it to be clear, that, upon eviction by any person claiming paramount to the lessor, they must, upon that eviction, have under the covenant in the leases satisfaction from his assets. Sir E. Sugden observes upon that case (a)—"The ground of this opinion must have been, that the eviction was owing to the *default* of the lessor, in not suffering a recovery. He assumed to be tenant in fee, and the nature of his title rested in his own breast; whether the default arose from fraud or negligence was, to the lessees, immaterial." In *Howell v. Richards*, 11 East, 633, relessors covenanted, that, *for and notwithstanding any act, &c., by them or any or either of them done to the contrary*, they had good title to convey certain lands in fee, *and also* that they, or some or one of them, *for and notwithstanding any such matter or thing as aforesaid*, had good right and full power to grant, &c.; *and likewise* that the relessee should *peaceably and quietly enter, hold, and enjoy* the premises granted, *without the lawful let or disturbance of the relessors, or their heirs or assigns, or for or by any other person or persons whatsoever*, and that the relessee should be kept harmless and indemnified by the relessors and their heirs against all other title, charges, *&c., *save and* [*325 *except the chief-rent* issuable and payable out of the premises to the lord of the fee: it was held that the generality of the covenant for *quiet enjoyment* against the relessors and their heirs, *and any other person or persons whatsoever*, was not restrained by the qualified covenants for *good title and right to convey for and notwithstanding any act done*

(a) Vendors and Purchasers, Vol. II. p. 518.

by the releassors to the contrary. To avail himself of the estoppel, the defendant should have prayed oyer of the deed, and demurred.

The fact that Peter Hopley was heir-at-law of Ann Hopley, is sufficiently alleged in the declaration. The allegation is, that "one Peter Hopley, who then claimed, and from thence hitherto hath claimed, and still doth claim, from, under, and as heir-at-law to, the said Ann Hopley, deceased, lawful right and title to the said messuage," &c., brought ejectment, &c. That is a distinct averment of the fact; and it is clearly sufficient, at all events on general demurrer. In 1 Wms. Saund. 235, *b c*, (a) it is said: "But, though a person who derives title under tenant for life, or *pur auter vie*, must aver the life of tenant for life, or *cestui que vie*, yet it seems not to be necessary to make an *express* averment thereof, as is done in this declaration. It is held, that, if it appear by *implication* that the life continues, it is sufficient, at least after verdict, or on general demurrer: as, where one who claims under a rector says that the rector was, *and yet is*, seised, it is a sufficient averment of his life: Scamler v. Johnson, Dyer, 304 a, Sir T. Jones, 227. So, where the plaintiff, lessee for years from a tenant for life, states in his declaration that he was *and still is* possessed, this is held to be a sufficient averment of the life of the tenant for life: Thompson v. Withers, 2 Bulstr.

*326] 263, 1 Brownl. 4, Anonymous. So, *in a cognisance as bailiff to husband and wife, he being seised in right of his wife, who was tenant for life, for rent *being in arrear*; the plaintiff demurred specially, because it was not averred that the wife was alive; and, by HALE, C. J., the words 'being in arrear' are *quasi* an averment of the wife's life; and, after verdict, or upon a general demurrer, had questionless been good; but, being upon special demurrer, he doubted. But TWISDEN and WILD, justices, held it good enough upon a special demurrer; and judgment was given for the avowant: Harlow v. Bradnox, 2 Lev. 88, 3 Keble, 151, 166. So, the words "as assignees," have been held to amount to an averment that the parties so described were in fact assignees. Thus, in Fletcher v. Pogson, 3 B. & C. 192, 5 D. & R. 1, a declaration in *sci. fa.* stated that R. S. (the plaintiff in the original action) became bankrupt, whereupon a commission was duly awarded against him, and E. F., R. B., and J. T. (the plaintiffs in the *sci. fa.*) were duly chosen assignees of the estate and effects of the said R. S. under the commission, "and now, on behalf of the said E. F., R. B., and J. T., *as assignees as aforesaid*, we have been informed," &c.: and it was held that this was good (the defendant not having demurred to it), without an *express* averment that an assignment of the bankrupt's effects had been made; for, that the expression "assignee as aforesaid" *might* mean "persons to whom an assignment has been made," and the 5 G. 2, c. 30, s. 26, having directed the choice of assignees to be followed up by an assignment of the effects to the person chosen, the court might presume that such an

assignment was made. "The expression 'as assignees as aforesaid,'" says BAYLEY, J., "may apply not only to persons chosen assignees, but to persons *being* assignees of the estate and effects; that is, to persons to whom an assignment has been made. It is *unnecessary to [*327 decide whether this would have sufficed, had the defendants demurred; but I think, that, having pleaded over, they are not in a situation to avail themselves of the objection, as the words are capable of receiving a construction which will support the proceeding." The same doctrine is laid down in *Eaton v. Southby*, Willes, 131, and *Mead v. Robinson*, Willes, 422. If the allegation that Peter Hopley *claimed* as heir-at-law of Ann Hopley, had been traversed, the plaintiff would have been bound to prove that he *was* her heir-at-law.

In all cases, it is sufficient, if the breach be assigned in the words of the covenant, or in words equivalent to the sense and intent of the covenant: Com. Dig. *Pleader* (2 V. 2). In *Foster v. Pierson*, 4 T. R. 617, (a) it was held, that, in assigning a breach of covenant, which was for quiet enjoyment, it is sufficient to allege, that, at the time of the demise to the plaintiff, A. B. had lawful right and title to the premises, and, having such lawful right and title, entered, &c., and evicted him, &c.; without showing what title A. B. had, or that he evicted the plaintiff by legal process, &c. (b) ASHHURST, J., there says: "The breach, though not accurately drawn, implies that the plaintiff was lawfully evicted, so as to bring the case within the meaning of the covenant; for, in substance, it is this—that the person who entered had a better title than the defendant, and having such title, entered upon the plaintiff." In none of the cases has the breach been in the negative breach, unless where the covenant has been against *all* acts. Affirmative words limit the proof. Thus, in *Harris v. Mantle*, 3 T. R. 307, it was held, that, if a breach of a covenant be assigned thus—"that the defendant has not used a farm in a husbandlike *manner, but, on the contrary, has committed [*328 waste," the plaintiff cannot give evidence of the defendant's using the farm in an unhusbandlike manner, if it do not amount to waste." So, on a declaration alleging that the defendant, being tenant to the plaintiff, cut down and destroyed trees on the premises, and *otherwise used the premises in so untenantlike and improper a manner*, that they became, and were, and are, dilapidated, and in bad and untenantable condition, the plaintiff cannot recover for permissive waste. *Martin v. Gilham*, 7 Ad. & E. 540. PATTESON, J., in the course of the argument, says: "A particular act of waste is alleged here, in destroying trees; what general allegation is there under which permissive waste could be proved?" And, in giving judgment, he says: "There are no words of suffering and permitting in this declaration; but it charges that the defendant 'used the

(a) And see 2 Wms. Saund. 181 a, n. (10).

(b) If A. B.'s title were precisely alleged, and the title, so alleged, were traversed, the plaintiff would not have the means of proving it.

premises' in so untenantlike a manner that they became dilapidated." In *Edge v. Pemberton*, 12 M. & W. 187,—which was an action on a covenant to keep demised premises in tenantable order and repair, and, at the end of the term, to deliver them up in such tenantable repair,—the breach assigned was, that the defendant did not nor would sufficiently repair and keep the said premises, &c., in tenantable order and repair, nor deliver them up in such tenantable repair at the end of the term, but, *on the contrary thereof, suffered and permitted* the premises to be and continue, and the same were, ruinous and in decay *for want of needful and necessary reparations*, &c., and the defendant, at the end of the term, left them so out of repair: and it was held, that, under this breach, the lessor could not recover for *voluntary waste*. Lord ABINGER there says: "If nothing had been stated, except merely to negative performance *329] of the covenant in its terms, and the issue *had been taken on that, it would have been taken to be a breach to the full extent of the covenant; but, when the plaintiff goes on to add the words—'but, on the contrary, suffered and permitted' the premises to be out of repair, he makes that allegation specific which before is general and uncertain, and is bound by it." Here, there is on the face of the declaration a general allegation of breach of the covenant. The covenant is against the acts of the parties, their heirs, executors, &c., or any other person or persons whomsoever lawfully or equitably claiming or to claim, by, from, or under, or in trust for him, them, or either of them, or the said Ann Hopley deceased. What difference is there between "claiming lawful title," and "lawfully claiming title?" and *Evans v. Vaughan*, 4 B. & C. 261, 6 D. & R. 349, is an instance of the form of traverse here adopted. In *Hobson v. Middleton*, 6 B. & C. 295, BAYLEY, J., says: "Although, in general, in pleading, an equivocal expression is to be construed against the party using it, yet, where the opposite party has pleaded over, that is an admission that the expression is to be taken in that sense which will support the previous pleading. [CRESSWELL, J. The declaration does not allege a recovery in the ejectment by Peter Hopley.] It alleges that Peter Hopley recovered possession of the premises by due process of law. A statement of a recovery in ejectment amounts to an allegation of lawful title: 2 Wms. Saund. 181 a, n. 10. It is there said, that, "if a recovery in ejectment be stated in the declaration to have been had by the person evicting, the defendant may, nevertheless, plead that the lessor of the plaintiff, that is, the person evicting, was not lawfully entitled, and, on issue being joined thereon, may prove that he had no lawful title; and this will be a bar to the *330] action." So here, it would be a good answer *to this declaration, to allege that Peter Hopley had not good title as heir-at-law.

Channell, Serjt., *Prendergast*, and *Dasent*, in support of the rule. The jury were clearly misdirected. In the first place, the recital in the deed, that Mrs. Raincock was the neir of Ann Hopley, was conclusive

evidence of that fact. And, in the next place, it was unnecessary to prove Mrs. Raincock's heirship, the plea affording a sufficient answer without that allegation: and, the rest of the plea having been proved, the learned judge ought to have directed the jury to find for the defendant.

This is the case of a covenant not for title, but merely for quiet enjoyment, and against eviction of a particular description only, *viz.*, by George Dawson Raincock and Martha Ann his wife, their heirs, executors, and administrators, or by any other person or persons lawfully or equitably claiming or to claim by, from, or under them, or either of them, or the said Ann Hopley, deceased: so that, in case of eviction by any person other than Raincock or his wife, or their heirs, &c., to bring it within this covenant, the eviction must be by one *lawfully or equitably* claiming by, from, or under him, them, or either of them, or from Ann Hopley. That being so, it was necessary to show that the party claiming not only had title, but that he insisted on his title, and that the party evicted was evicted in consequence thereof. The defendant contends that that which forms an essential element in the plaintiff's case is a matter that was brought about by the act of Henry Shadow Young himself. It was quite unnecessary to allege in the plea that Martha Ann Raincock was the only child and heir-at-law of Ann Hopley. Suppose, instead of replying *de injuriâ*, the plaintiffs had traversed the heirship as alleged, the replication would have been bad, as tendering *an immaterial [*331 issue. [CRESSWELL, J. You say,—admitting that the title was bad, Henry Shadow Young might still have enjoyed the land, but for his own act?] Precisely so. It is not enough to show that Peter Hopley had lawful right; the plaintiffs were bound to show that he lawfully claimed: *Fowle v. Welsh*, 1 B. & C. 29; *Eeles v. Lambert*, Aleyn, 38; *Foster v. Pierson*, 4 T. R. 617; *Proctor v. Newton*, 2 Levinz. 37; *Hodgson v. The East India Company*, 8 T. R. 278. The cases of *Lainson v. Tremere*, 1 Ad. & E. 792, 3 N. & M. 603; *Bowman v. Taylor*, 2 Ad. & E. 278, and *Carpenter v. Buller*, 8 M. & W. 209, are distinct authorities to show that the recital here was conclusive.

It is undoubtedly true, that, if the estoppel appears upon the record, and the defendant, instead of relying upon it, chooses to go to issue upon the fact, he thereby sets the matter at large, and the jury are at liberty to disregard the estoppel, and find the truth: *Com. Dig. Estoppel (C)*; *Goddard's case*, 2 Co. Rep. 4 b; *Trevivan v. Lawrence*, 1 Salk. 376, 2 Ld. Raym. 1036; *Vooght v. Winch*, 2 B. & Ald. 662; *Magrath v. Hardy*, 4 N. C. 782, 6 Scott, 627; *Wilson v. Butler*, 4 N. C. 748, S. C. per nom. *Wilson v. Wilson*, 6 Scott, 540, Arnold, 333; *Bowman v. Rostron*, 2 Ad. & E. 295 (b). But here it is to be considered as part of the declaration, which, if bad on general demurrer, is also bad on motion in arrest of judgment. [CRESSWELL, J. That appears to be inconsistent with the rule, that, if you give your adversary an opportunity of going to the jury upon it, you lose the benefit of the estoppel.]

The generality of the terms of the covenant for quiet enjoyment, is restricted by the introductory words of the covenants for title and for *332] power to convey. The *covenant for title is preceded by these words,—“that, for and notwithstanding any act, matter, or thing by them the said George Dawson Raincock and Martha Ann, his wife, or either of them, or the said Ann Hopley, deceased, made, done, omitted, committed, or knowingly or willingly suffered to the contrary,” &c. And the covenant for title is in like manner introduced by the words—“and that, for and notwithstanding any such act, deed, matter, or thing as aforesaid,” they, the said George Dawson Raincock and Martha Ann, his wife, &c., have power, &c., to appoint, &c. And this restrictive clause must be considered as drawn down to, and embodied in, the covenant for quiet enjoyment. In Sugden’s Vendors and Purchasers, 10th edit. Vol. II. p. 526, 11th edit. p. 756, it is said: “Where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct. Thus, in *Nervin v. Munns*, 3 Levinz. 46, the vendor covenanted,—first, that, notwithstanding any act by him to the contrary, he was seised in fee,—secondly, that he had good right to convey,—thirdly, that the lands were clear of all encumbrances made by him, his father, or grandfather,—and, fourthly, that the vendee should quietly enjoy the estate against all persons claiming under the vendor, his father, or grandfather: and it was holden, by three justices, against NORTH, C. J., that the second covenant, although general, was restrained by the first covenant to acts done by the vendor.” That case of *Nervin v. Munns* is followed by *Browning v. Wright*, 2 B. & P. 13, where the vendor, who claimed an estate in fee by purchase, sold the estate, and covenanted, that, notwithstanding anything done by him to the contrary, he was seised in fee, “and that he had *333] *good right, &c., to convey, in manner aforesaid,” and it was holden that the generality of the latter covenant was restrained by the restrictive words in the former. “For,” says Sir E. Sugden, “in the first place, the purchaser was, according to the general practice, entitled to limited covenants only; and, in the next place, special covenants would be of no use, if the other were general. Besides, the defendant having covenanted, that, ‘for and notwithstanding anything by him done to the contrary,’ he was seised in fee, and that he had good right to convey; the latter part of the covenant, coupled as it was with the former part by the words, ‘and that,’ must necessarily be over-ridden by the introductory words ‘for and notwithstanding anything by him done to the contrary.’” The judgment of Lord ELDON in that case, is most clear and satisfactory. [V. WILLIAMS, J. In *Smith v. Compton*, 3 B. & Ad. 189, Lord TEN-TERDEN, commenting on *Browning v. Wright*, says: “The covenant there, if taken by itself, was general, and it was held to be qualified by the preceding and subsequent ones; but there the first and second cove-

nants were connected together by the words 'for and notwithstanding anything by him done to the contrary,' which extended to both." (a)] The connecting words here are the same as those in *Browning v. Wright*. Speaking of the very remarkable case of *Howell v. Richards*, 11 East, 633, Sir E. Sugden says (10th edit. Vol. II. p. 529, 11th edit. p. 758): "Lord ELLENBOROUGH, in delivering the opinion of the court, justly laid great stress on the covenant being a distinct covenant from the covenant for title. He said that it was perfectly consistent with reason and good sense that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of title which he *pur- [334 ports to convey, than for quiet enjoyment. He may suspect, or even know, that his title is, in strictness of law, in some degree imperfect, but he may at the same time know that it has not become so by any act of his own; and he may likewise know that the imperfection is not of such a nature as to afford any reasonable chance of disturbance whatever to those who should take under it: he may, therefore, very readily take upon him an indemnity against an event which he considers as next to impossible, while he chooses to avoid a responsibility for the strict legal perfection of his title to the estate, in case it should be found, at any period, to have been liable to some exception at the time of his conveyance. He did not find any case in which it was held that the covenant for quiet enjoyment was all one with a covenant for title, or parcel of that covenant, or in necessary construction to be governed by it, otherwise than as, according to the general rules for the construction of deeds, every deed is to be construed—according to the intention of the parties." These two cases of *Howell v. Richards* and *Browning v. Wright* are commented upon in *Nind v. Marshall*, 1 Brod. & B. 319, 3 J. B. Moore, 703, which is thus stated by Sir E. Sugden (Vol. II. 10th edit. p. 529, 11th edit. p. 758): "In a later case, where the subject was elaborately discussed, the covenants in an assignment of a leasehold estate, were 1. that, notwithstanding any act by the seller, the lease was a good lease,— 2. 'and further that' the purchaser might peaceably enjoy without any interruption from 'the seller, his executors, administrators, or assigns, or any other person or persons whatsoever, having or lawfully claiming, or who should or might at any time or times thereafter, during the said term, have or lawfully claim any estate,' &c., in the premises; and that, free from encumbrances by the *seller; and moreover for further [*335 assurance by the seller, his executors, and administrators, and all persons claiming by, from, under, or in trust for him or them. All the covenants, therefore, were restricted to acts of the seller, except the covenant for quiet enjoyment, which in words expressly extended to all mankind. It was held, by three judges against one, that, by construction, the covenant for quiet enjoyment was restrained to persons claiming under the seller; and this case was distinguished from *Howell v. Richards*,

(a) Reading "and that he had," &c., as "and had," &c.

on the ground that there, the covenant respecting encumbrances, contained words as general as the words of the preceding covenant for quiet enjoyment, with one single exception, viz. the chief-rent, which was not an act or default of the party, or of any claiming under him: this exception, therefore, confined the generality of all the other words." [V. WILLIAMS, J. The words "notwithstanding anything done by him (the grantor) to the contrary," governed both branches of the sentence in *Browning v. Wright*, Vide *suprà*, 333 (b). Is that so here?] It is submitted that it is. In *Gainsford v. Griffith*, 1 Wms. Saund. 60 a, this difference was taken, that, "if a restrictive clause be in the first or last part of a sentence, or at the beginning of the first, or at the end of the last sentence, which in good sense may be applied to the one and the other, there it shall extend to both sentences: but otherwise it is, if such sentence be placed in the middle of one of two sentences, as in *Crayford v. Crayford*, Cro. Car. 106, and *Hughes v. Bennett*, Cro. Car. 495." In *Stannard v. Forbes*, 6 Ad. & E. 572, 1 N. & P. 633, where the seller of a leasehold estate depending upon a life, covenanted that, notwithstanding any act by him done, the lease was valid, *and that the same*, and the *336] term therein expressed, was in full force, and *in no wise determined, &c., otherwise than by effluxion of time,—the second covenant was held to be restrained by the first, and was therefore not broken, although the life upon which the lease depended had dropped before the assignment: and it was considered to be no objection to this construction, that these last words rendered the restriction nonsensical, as effluxion of time could have been no act of the covenantor." [MAULE, J. Do you say that an eviction by a grantee or devisee of Ann Hopley would be within this covenant?] Possibly it would not apply to an eviction by a devisee: but it would to the case of a vendee; for, that would be an act done by her which the covenant expressly provides against. In 2 Wms. Saund. 181 b, n., it is said: (a) "In an action of covenant that *the grantor has good right, full power, and lawful authority to grant*, it is held that the breach may be as general as the covenant, namely, *that he had not good right, full power, and lawful authority to grant*, without stating any eviction or interruption: as, where the declaration stated 'that the defendant, at the time of making the said indenture, had not full power and lawful authority to demise the premises according to the form and effect of the said indenture;' and, after verdict, and judgment for the plaintiff, it was assigned for error, that the plaintiff, in his declaration, had not shown what person had right, title, estate, or interest in the demised premises at the time of making the indenture, by which it might appear to the court that the defendant had not full power and lawful authority to demise the premises: but it was resolved that the assignment of the breach of covenant was good, for he has followed the words of the covenant negative, and it lies more properly in the knowledge of

(a) Citing *Bradshaw's case*, 9 Co. Rep. 60, b., Cro. Jac. 304.

he lessor what estate he had in the land *which he demised, than [*337 of the lessee, who was a stranger to it ; and therefore the defendant ought to show what estate he had in the land at the time of the demise made, by which it might appear to the court that he had full power and lawful authority to demise it." *Cur. adv. vult.*

COLTMAN, J., now delivered the judgment of the court.

After setting out the facts and pleadings *ut ante*, 310-316, the learned judge proceeded as follows:—

Upon the trial, it was contended, on behalf of the defendant, that the recital in the deed,—That Mrs. Raincock was the heir of Mrs. Hopley, —was conclusive evidence of that fact.

The learned judge was of opinion that the recital, if evidence at all, was not conclusive ; and the other evidence having established, to the satisfaction of the jury, that she was illegitimate, a verdict was, by his direction, found for the plaintiff.

A rule nisi was afterwards obtained for a new trial, or to arrest the judgment.

On the argument before us, it was insisted that the direction of the judge was wrong on two grounds,—first, because the recital in the deed was conclusive,—secondly, because the allegation of Mrs. Raincock's heirship did not require to be proved, the plea being a sufficient answer without that allegation ; and that, the rest of the plea having been proved, he ought to have directed the jury to find for the defendant.

To show that the recital was conclusive, the counsel for the defendant referred to the cases of *Lainson v. Tremere*, 1 Ad. & E. 792, 3 N. & M. 603, *Bowman v. Taylor*, 2 Ad. & E. 278, 4 N. & M. 264, and *Carpenter v. Buller*, 8 M. & W. 209 : and it seems clear, that, where [*338 it can be collected from the deed, that the parties to it have agreed upon a certain admitted state of facts as the basis on which they contract, the statement of those facts, though but in the way of recital, shall estop the parties to aver the contrary. Whether the recital in the present case is one which, after the plaintiff had been evicted from the estate by title paramount, would have estopped him, if advantage had been duly taken of it by the defendant's pleading the estoppel, and relying upon it, is not necessary to be determined ; for, the defendant has not adopted the course of referring the consideration of the estoppel to the court, but has pleaded the fact of Mrs. Raincock's heirship ; and, by joining issue on the replication, has referred it as matter of fact to the jury, who are not bound by the estoppel, but may(a) find the truth of the fact according to the evidence. This doctrine was much discussed in the case of *Magrath v. Hardy*, 4 N. C. 782, 797, 6 Scott, 627, in which it was held, that, if the estoppel appears on the record, and the party who is entitled to take advantage of it, instead of relying on it, goes to issue on the fact, he puts the matter at large, and the jury may disregard the estoppel. *Vooght v. Winch*, 2 B. & Ald. 662, and *Bowman v. Rostrow*,

(a) And must.

4 N. & M. 551, S. C. per nom. *Bowman v. Rostron*, 2 Ad. & E. 295, n., are to the same effect.

It remains to be considered whether the rest of the plea, excluding the allegation of Mrs. Raincock's heirship, is an answer to the action,—that answer being, in substance, that Henry Shadow Young instigated and procured Peter Hopley to bring the ejectment, and to evict him.

It was urged, that, to constitute a breach of covenant for quiet enjoyment, there must not only be an adverse *title, but an insisting on
*339] the title adversely; and therefore, if the party disturbed has brought about the act of disturbance by his own act, he cannot complain of the disturbance. As, in *Dyer*, 30 a. "The condition of an obligation was such, that the obligor should surrender a certain copyhold, and would suffer the obligee and his heirs peaceably to enjoy the land without interruption of any person. The defendant pleads performance, and that the plaintiff peaceably continued his possession according to the condition for a certain time, and then the lord, for rent in arrear, entered, agreeably to the custom, for a forfeiture; and the plea was held good: and the law is the same, if he were a tenant at the common law, and the obligee ceased,(a) the obligation is saved, for, it was the act of the plaintiff himself."

But these cases are distinguishable; for, in them, the party disturbing had title of entry by the act of the plaintiff himself. In the present case, Peter Hopley had title of entry quite independent of any act done by Henry Shadow Young; and, when he entered under lawful title not derived from the plaintiff, the covenant was broken, whatever might be the motive that induced him to enter. We think, therefore, the plea is insufficient, if the allegation of the heirship of Mrs. Raincock be struck out from it; and, consequently, that the verdict was properly found for the plaintiff.

The first ground on which the motion to arrest the judgment rested, was, that it was only alleged in the declaration that Peter Hopley *claimed*, as heir-at-law to Ann Hopley, lawful title to the premises; whereas, it ought to have alleged that he *was* heir-at-law to Ann Hopley, or that he *lawfully claimed* lawful title.

The allegation in question might have been open to objection on special demurrer, on the ground of uncertainty; but, after it has been pleaded
*340] over to, we think *it must be understood to mean, not only that he *claimed* to have, but that he *had*, lawful title. The objection on this ground, therefore, fails.

It was further objected, that the generality of the terms of the covenant for quiet enjoyment, was restricted by the introductory words of the covenant for title and for power to convey: The covenant for title is introduced by a restrictive clause, that, notwithstanding any act done or omitted by Raincock and his wife, or either of them, or Ann Hopley,

(a) i. e. *Cessavit per biennium*; as to which see F. N. B. 208.

they or one of them are or is seised in fee. The covenant that they have right to convey, is preceded by a similar restrictive clause. But, when we come to the covenant for quiet enjoyment, the restrictive clause is not repeated: and, after the covenant for quiet enjoyment, there follows a covenant for further assurance, to which a restrictive clause of this nature would be inapplicable, and in which it is consequently not found.

On the part of the defendant, it was contended that the restrictive clause in question is to be drawn down from the first two covenants, and to be considered embodied in the third covenant: and the opinion of the majority of the court in the case of *Nind v. Marshall*, 1 B. & B. 319, and the case of *Browning v. Wright*, 2 B. & P. 13, were relied on in support of the position contended for.

It cannot be disputed, that the general introductory words of one of the usual covenants for title, may be drawn down in this way, and applied to others, in which they are not to be found, where, from what is found in other parts of the deed, it appears that such must have been the intention of the parties. But, admitting this principle, the question will remain, what reason there is for introducing into the present covenant, by implication, a restrictive clause which is not found in it. The covenant, read without the restrictive clause, seems to be a reasonable and usual one. The *estate in question is recited to have been [*341 purchased by Mrs. Hopley, and is sold by one purporting to represent her as heir. On such a conveyance, it would be reasonable to expect that the estate should be cleared from any charges from Mrs. Hopley (a) downwards to the present purchaser: and, accordingly, the covenant, as it stands, is a covenant for quiet enjoyment against any lawful let, &c., by Raincock and wife, or by any other person lawfully or equitably claiming from or under Raincock and wife, or either of them, or the said Ann Hopley. The covenant, as it stands, without the restrictive words, is quite consistent with the covenant for further assurance, by which it is covenanted that Raincock and wife, and every other person claiming under them or either of them, or under Ann Hopley, shall make further assurance, on every reasonable request. But, if the restrictive words which it is sought to introduce into the covenant for quiet enjoyment, are to be considered as introduced into it, and have the effect contended for,—that the entry by Peter Hopley, not being occasioned by any act or default of Mrs. Hopley, is not a breach of the covenant for quiet enjoyment,—this inconsistency will result from it, that the covenant for quiet enjoyment will not extend to protect the purchaser from a disturbance by Peter Hopley; but the covenant for further assurance will entitle the purchaser to a conveyance from Peter Hopley of his right to the estate, or, in case of refusal, entitle him to maintain an action against the present defendant for such refusal.

We are, therefore, of opinion that there is no reason for introducing

(a) Inclusive, *ut videtur*.

into the covenant for quiet enjoyment, the restriction contended for. The rule, therefore, will be discharged. Rule discharged.

*342] *The Right Hon. SPENCER BULKELEY Lord NEWBOROUGH, J. E. SHEARMAN, and THOMAS DYKE, v. LUDOLF BALTHAZAR SCHROEDER. Feb. 14.

It is unnecessary to make profert of deeds or other instruments which are set out by way of inducement only.

In pleading,—except in deducing title,—a deed may, at the option of the party pleading it, be set out, either in its terms, leaving the court to construe it, or according to its legal effect.

In an action for the breach of a covenant of indemnity contained in an indenture of November, 1842, the declaration set forth an indenture of January, 1809, being a settlement made on the marriage of A. with B., by which provision was made for effecting a policy of assurance on the life of B., the proceeds of which were to be subject to the appointment of A. and B., or of the survivor, in favour of a child or children of the marriage; it then set out a settlement of March, 1840, made upon the marriage of C., a daughter of A. and B., with D., reciting the death of A. without having exercised the power of appointment, by which deed C., with the consent of D., her then intended husband, assigned all her interest in any fortune to which she might become entitled under the will of her mother, to trustees, for the separate use of C., with a power of appointment by C. in favour of children of that marriage. Of these deeds no profert was made. The declaration then set out, with profert, the indenture of November, 1842,—reciting the death of B., that she had made a will, dated in July, 1840, whereby she appointed the sum of 2000*l.* to be settled “upon the trusts declared in the indenture of settlement of March, 1840, so far as the rules of law and equity would permit, and she had power so to direct and appoint, but, if she had not such power, then she willed and appointed that the 2000*l.* should be paid to C., or as C. should by writing direct and appoint, for her separate use,”—and further reciting that by another indenture the plaintiffs became trustees under the indenture of March, 1840, that they had received the 2000*l.*, which was property of a personal nature to which C. was beneficially entitled under the will of B., and that the same was in their hands subject to, and charged in equity with, the trusts of the indenture of March, 1840, that D. was desirous to obtain from the plaintiff a loan of the 2000*l.*, and that it was considered that B. had not power to appoint the 2000*l.* to be settled upon the trusts of the indenture of March, 1840, and therefore that, under the alternative appointment made by her, C. had become entitled thereto absolutely for her separate use, but that a question had been made whether it was not subject to the assignment made by the indenture of March, 1840, wherefore the said C., with the approbation of D., her husband, had proposed and consented that the 2000*l.* should be paid to the plaintiffs as trustees, to be held by them upon the trusts therein declared, they being indemnified by C. and D.

The declaration then averred that the 2000*l.* had been accordingly lent by the plaintiffs to D.; that that sum remained unpaid; that, by an indenture of September, 1845, T. S. and others were appointed trustees of the indenture of March, 1840, in place of the plaintiffs; that T. S., as such trustee, had commenced a suit in Chancery against the plaintiffs and others to compel them to invest the 2000*l.* so lent to D.; that D. had notice of the proceedings, and was required to take upon himself the defence thereto, and to indemnify the plaintiffs; that D. declining to take upon himself the defence, the plaintiffs consented to an order whereby they became liable to transfer to the accountant-general a certain amount of stock, and were put to expense:—

Held,—first, that profert of the indentures of January, 1809, and March, 1840, was not necessary, those indentures being stated by way of inducement only:

Secondly, that the indenture of March, 1840, not deducing title, it was sufficient to set it out in its terms:

Thirdly, that it was not necessary to the maintenance of the action, that the indenture of March, 1840, should be valid as an assignment at law; but that, it was enough if it bound the fund in equity in the hands of the trustees:

Fourthly, that the plaintiffs were not precluded from recovering upon the defendant's contract of indemnity, by their having consented to a decree before hearing,—it not being shown that

the decision could be in any degree affected by the stage of the cause in which it was pronounced, or that the plaintiffs, by incurring the expense of prosecuting the suit to the hearing, could have made any effectual defence, or have diminished the damage consequent upon an adverse decision.

THIS was an action of covenant. The declaration stated, that, on the 3d of January, 1809, by a certain indenture then made between the Rev. John *Werninck, D. D., of the first part, the Hon. Lena, [*343 otherwise Magdalena Wynn, afterwards the wife of the said John Werninck, of the second part, and the Right Hon. T. J. Bulkeley, Lord Viscount Bulkeley, Henry Hope, and John Pownall, of the third part,—being a settlement made in contemplation of the then intended marriage between the said John Werninck and the said Lena Wynn, and being the indenture described in the indenture the tenor whereof is hereinafter set forth as made on or about the 3d of January, 1809,—all the interest of her the said Lena Wynn of and in certain annual rents or yearly sums of money in the said deed mentioned, were by her assigned unto, and vested in, the said Viscount Bulkeley, Henry Hope, and John Pownall, their heirs and assigns, upon the trusts and for the intents and purposes, and subject to the provisoes, *declarations, and agreements there- [*344 inafter expressed and declared concerning the same respectively, that is to say, in trust for the said Lena Wynn and her assigns, until the said intended marriage should be had and solemnized; and, from and after such marriage, upon trust, by or out of the moneys to be received on account of the same annual rents or yearly sums, or either of them, or any part thereof, to procure from the Equitable-Assurance Office, or some other public office or offices for the assurance of lives in London or Westminster, a policy or policies of assurance to them the said trustees, their executors, administrators, or assigns, or to the survivor or survivors of them, their or his executors, administrators, or assigns, for securing the payment of the sum of 5000*l.*, or any separate sums of money amounting to 5000*l.*, upon the death of the said Lena Wynn, and, from time to time after such insurance should be effected, and during the life of the said Lena Wynn, to keep and continue the same in full force, and to pay such annual premiums or sum or sums of money as should be necessary and sufficient for that purpose, and all other costs, charges, and expenses attending the effecting and continuing such insurance; and also upon trust, from time to time during the life of the said Lena Wynn, as and when the said annual rents or yearly sums expressed and intended to be thereby granted and conveyed, or any part thereof, should be received, to stand possessed of the same, or so much thereof as should remain after effecting and keeping on foot such insurance, for the sole and separate use of the said Lena Wynn, independent of the said John Werninck, her then intended husband, and so as not to be in any wise subject to his interference, dominion, or control, debts, or engagements, and to pay the same into her proper hands from

time to time for that purpose, or to such person or persons, and for such
*345] *intents and purposes, as she, by writing under her hand, should
at any time during such her coverture, or from time to time, order
or direct; and it was thereby further declared and agreed by and between
the parties to those presents, that, from and after the death of the
said Lena Wynn, the said Viscount Bulkeley, Henry Hope, and John
Pownall, and the survivor and survivors of them, and the executors and
administrators of such survivor, should stand possessed of or interested
in the principal moneys which should become due and be received upon
such policy or policies of insurance as aforesaid, upon trust for an only
child, or for all and every, or for any one or more, exclusive of the rest,
of the children of the said intended marriage, if there should be more
than one, in such parts, shares, or proportions, for such interest or inter-
ests, to vest and be payable at such time or times, and under and sub-
ject to such charges or limitations over, powers, conditions, or restrictions,
or in such other form as the said John Werninck and Lena Wynn, his
intended wife, or the survivor of them, should, by any deed or deeds,
writing or writings, with or without power of revocation, to be made,
sealed, and delivered by both of them, or by the survivor of them, as the
case might happen, and to be attested by one or more credible witness
or witnesses, or by the last will and testament of such survivor, or any
codicil or writing in the nature of, or purporting to be, his or her will,
to be signed and published by him or her, and attested in like manner,
should at any time thereafter, and from time to time, direct or appoint;
but not so as to enable the said John Werninck, if he should survive, to
divest any portion which should have become payable according to the
trusts thereafter declared; and, for want of such direction or appoint-
ment, or so far as such direction or appointment, if incomplete, should
*346] not extend, *in trust for an only child, or for all and every the
children of the said intended marriage, if there should be more
than one, equally to be divided amongst them, and to be deemed a vested
interest or vested interests in a son or sons respectively on his or their
attaining the age of twenty-one years, and in a daughter or daughters on
her or their attaining such age or marrying, which should first happen,
notwithstanding such time or times of vesting might arrive in the life-
time of the said Lena Wynn, and to be payable at such time or respec-
tive times of vesting, if the same should happen after her death, and
otherwise as soon after her death as might be, &c.: That afterwards, to
wit, on the 4th of February, 1809, the said intended marriage was had
and solemnized between the said John Werninck and the said Lena
Wynn; and afterwards, to wit, on the 23d of January, 1809, the trus-
tees in the first-mentioned indenture mentioned, in pursuance thereof, by
and out of moneys received by them, on account of the said annual rents
or yearly sums, procured and effected from and in the said Equitable-
Assurance Office a policy of assurance to them the said trustees, their

executors, administrators, and assigns, for securing the payment of 5000*l.* upon the death of the said Lena Wynn, together with such bonuses upon the same as should, from time to time, by the rules of the said assurance office, become payable in respect of the said policy, and the said policy of assurance was, from time to time during the life of the said Lena Wynn, kept and continued in full force by the payment of premiums in respect thereof from and out of the annual rents and moneys, by the trustees for the time being charged with the execution of the said trusts in respect thereof, and at the time of the death of the said Lena Wynn hereinafter mentioned, a large sum of money, to wit, 14,000*l.*, was due and payable by the said Equitable-Assurance Office upon and in respect of the said policy *of assurance for the said sum of 5000*l.* and divers bonuses pay- [*347
able by the said assurance office by virtue thereof, which said sum so due was charged with the trusts, and applicable to the purposes, in the said first-mentioned indenture mentioned of and concerning the same: That, after the said marriage, to wit, on the first of January, 1820, the said John Werninck died, leaving his said wife, and divers, to wit, four children of the said marriage,—whereof one afterwards became the wife of the defendant, as hereinafter mentioned,—him surviving, and without having made any appointment or direction, either alone or jointly with his said wife, pursuant to the said first-mentioned indenture: That afterwards, and before the commencement of this suit, to wit, on the 4th of March, 1840, by a certain indenture then made between the defendant of the first part, Maria Lena Werninck (who was one of the children of the said marriage between the said John Werninck and the said Lena, his said wife) of the second part, the said Right Honourable Spencer Bulkeley Lord Newborough, one Henry Hope Werninck, and the said James Edward Shearman, of the third part,—being a settlement made in contemplation of the then intended marriage of the defendant and the said Maria Werninck, and which is described in the indenture the tenor whereof is hereinafter set forth, as an indenture made on or about the 4th of March, 1840,—it was, amongst other things, witnessed that the said Maria Lena Werninck did, with the consent and approbation of the defendant, thereby assign all her right, title, interest, benefit, power, claim, and demand whatsoever in or to a certain principal sum of 50,000 florins, Dutch stock, &c., and also in, to, or out of any fortune or property of a personal nature, of or to which the said Maria Lena Werninck might become possessed, or beneficially entitled, under or by virtue of the last will and testament of her said mother, *Lena Werninck, unto the [*348
said Spencer Bulkeley Lord Newborough, Henry Hope Werninck, and James Edward Shearman, their executors, administrators, and assigns, upon and for certain trusts, intents, and purposes therein expressed, declared, and contained of and concerning the same, that is to say, in trust for the said Maria Lena Werninck, her executors and administrators, in the meantime and until the said intended marriage

should be had and solemnized, and, from and immediately after the solemnization thereof, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, declarations, and agreements thereafter expressed, declared, and contained of and concerning the same, that is to say, in trust that they the said Spencer Bulkeley Lord Newborough, Henry Hope Werninck, and James Edward Shearman, and the survivor or survivors of them, their or his executors, administrators, or assigns, should, as soon as circumstances would permit, procure the said 50,000 florins stock, stocks, or funds and securities respectively, to be assigned and transferred into their or his names or name, and should lay out and invest the aforesaid trust sum and sums of money forthwith, after the same should be received in or upon public or parliamentary stocks, funds, or securities in England or Holland in the names or name of the said trustees or trustee for the time being, and should pay the dividends, interest, and annual proceeds to accrue due from time to time during the joint natural lives of the said Maria Lena Werninck and Ludolf Balthazar Schröder for and in respect of the said trust florins and stock, stocks, funds, and securities respectively, unto such person or persons, for such ends, intents, and purposes, and in such manner and form, as the said Maria Lena Werninck, notwithstanding her being under coverture, should, by any note or writing under her hand, to be by her signed in the presence of and at-
*349] tested *by one or more credible witness or witnesses, order or direct; and, failing such order or direction, then to pay the same dividends, interest, and annual proceeds, from time to time, into the proper hands of the said Maria Lena Werninck, for her separate use and benefit, exclusive of the said Ludolf B. Schröder, and the same not to be in any wise subject to his control, debts, or engagements, but the receipt and receipts of the said Maria Lena Werninck, or of the person or persons to whom she should so order or direct the said dividends, interest, and annual proceeds to be paid as aforesaid, should alone be a good and sufficient discharge, and good and sufficient discharges for the same; and upon further trust, after the decease of the said Ludolf B. Schröder, and in case the said Maria Lena Werninck, his intended wife, should survive him, to pay the dividends, interest, and annual proceeds of the said trust florins, stock, stocks, or funds and securities respectively to accrue due after the death of the said Ludolf B. Schröder, unto the said Maria Lena Werninck and her assigns, from time to time, during the remainder of her natural life, for her and their proper use or benefit; but, in case the said Ludolf B. Schröder should survive the said Maria Lena Werninck, his intended wife, then in trust, from and after the decease of the said Maria Lena Werninck, to pay the dividends, interest, and annual proceeds of the said florins, stock, stocks, or funds and securities respectively, unto the said Ludolf B. Schröder and his assigns during his life, for his and their proper use and benefit, but so, never-

theless, that, in case he the said Ludolf B. Schröder should happen to become bankrupt, or should take the benefit of any act of parliament for the relief of insolvent debtors, then the dividends, interest, and annual proceeds to accrue due in respect of the said trust florins, stock, stocks, or funds and securities *respectively, during the remainder of the life of him the said Ludolf B. Schröder, should [*350 go and be payable and paid in such and the like manner as the same would go and be payable if the said Ludolf B. Schröder were dead: and it was thereby further agreed and declared, that the said Spencer Bulkeley Lord Newborough, Henry Hope Werninck, and J. E. Shearman, and the survivors and survivor of them, their or his executors, administrators, and assigns, should stand possessed of the said florins, stock, stocks, or funds, securities, moneys, personal estate, effects, and premises thereinbefore assigned, or intended so to be, subject, and without prejudice, to the trusts thereinbefore expressed and declared, in trust for all or such one or more of the children of the said intended marriage, at such ages, days, or times, in such shares and proportions, if more than one, and with such benefit of survivorship, and limitations over to or for any other or others of the same children, and in such manner and form, as the said Ludolf B. Schröder and Maria Lena Werninck, his intended wife, at any time or times during their joint lives, by any deed or deeds, instrument or instruments in writing, to be by them sealed and delivered in the presence of and attested by two or more credible witnesses, should direct or appoint, and, for want of any such direction or appointment, and so far as the same should not operate as a full and complete disposition of the said trust premises, then as the survivor of the said Ludolf B. Schröder and Maria Lena Werninck, his intended wife, by any deed or deeds, instrument or instruments in writing, to be by him or her sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his or her last will and testament in writing, or any codicil or codicils thereto, to be signed in the presence of, and attested by, two or more credible witnesses, should direct or *appoint; and, failing any such direction or appointment as afore- [*351 said, and subject to any incomplete disposition to be made by any of the ways aforesaid, upon trust that they the said Spencer Bulkeley Lord Newborough, Henry Hope Werninck, and J. E. Shearman, or the survivors or survivor of them, their or his executors, administrators, or assigns, should assign and transfer and pay the said florins, stock, stocks, or funds, securities, moneys, personal estate, effects, and premises respectively, unto, between, and amongst all the children of the said intended marriage, if more than one, equally, share and share alike, and, if there should be but one child of the said intended marriage, then the whole to such one child, for their, his, or her portions or portion, the portion, part, or share, portions, parts, or shares, of such child or children, being a son or sons, to be assigned, transferred, and paid to him.

or them at his or their age or respective ages of twenty-one years, or as soon afterwards as the trusts thereinbefore expressed and contained for the benefit of his or their parents would permit, and the portion, part, or share, portions, parts, or shares of such child or children, being a daughter or daughters, to be assigned, transferred, and paid to her or them at her or their age, or respective ages, of twenty-one years, or day or respective days of marriage, which should first happen, or as soon afterwards as the said trusts for the benefit of her or their parents would permit; and, in case either or any of the said sons should die under the age of twenty-one, or either or any of the said daughters should die under that age and unmarried, then the portion, part, or share, portions, parts, or shares of such son or sons so dying under the age of twenty-one years, and of such daughter or daughters so dying under that age and unmarried, should go and accrue to the other and others of the same *352] children, and in equal shares and proportions if *more than one, and be assigned, transferred, and paid at the same time or times as, and together with, his, her, or their original portion, part, or share, portions, parts, or shares, or as near thereto as circumstances would permit, and so that the executors or administrators of any deceased child or children, having attained a vested or transmissible interest, or vested or transmissible interests, respectively, should take the same, but no greater, share than his, her, or their testator or intestate would have been entitled to if living; but, in case there should be no child of the said intended marriage, or if all such children should happen to die before any or either of them should attain a vested or transmissible interest in the said trust premises, then the said trustees, and the survivors and survivor of them, their and his executors, administrators, and assigns, should and would stand possessed of the said florins, stock, stocks, or funds, &c. (subject and without prejudice to the trusts aforesaid, and to the powers thereafter contained), in trust for such person or persons, for such interest or interests, intents, and purposes as the said Maria Lena Werninck, at any time during the joint lives of herself and the said Ludolf B. Schröder, her intended husband, and notwithstanding her being under coverture, should, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by her in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any codicil or codicils thereto, or any writing purporting to be her last will and testament, or a codicil thereto, to be signed in the presence of, and attested by, two or more credible witnesses, direct or appoint, and, for want of any such direction or appointment, and so far as the same should not operate as a full and complete disposition of the said trust premises, in trust as follows, that is *353] to say, *in case the said Maria Lena Werninck should survive her said intended husband, then, in trust for the said Maria Lena Werninck, her executors, administrators, and assigns absolutely; but, if

the said Maria Lena Werninck should die in the lifetime of the said Ludolf B. Schröder, her intended husband, then, subject as aforesaid, in trust for such person or persons as would have been entitled to the said florins, stocks, &c., at the time of the decease of her the said Maria Lena Werninck, in case she had died possessed thereof unmarried and intestate; and upon this further trust, that the said Spencer Bulkeley Lord Newborough, Henry Hope, and J. E. Shearman, or the survivors or survivor of them, their or his executors, administrators, or assigns, should, after the decease of the said Maria Lena Werninck, and subject and without prejudice to the beneficial right and interest therein of the said Ludolf B. Schröder, during his natural life, but determinable as aforesaid, pay, apply, and dispose of the whole, or a competent part, in the discretion of the same trustees or trustee, of the dividends, &c., of the share or shares, or presumptive share or shares of the said child or children of and in the said florins, stock, &c. [for the maintenance and advancement of children]; with certain powers of changing the securities upon which the said trust moneys in the said last-mentioned deed mentioned were from time to time to be invested: [Proviso for the appointment of new trustees in the event of death, resignation, &c., of the former trustees]: That, afterwards, to wit, on the 5th of March, 1840, the said intended marriage between the defendant and the said Maria Lena Werninck took place and was solemnized: That the said Lena, otherwise Magdalena Werninck afterwards, and after the passing of the 7 W. 4 & 1 Vict. c. 26, to wit, on the 10th of July, 1840, made her last will and testament in writing, *signed by her, and published and declared by her to be her last will and testament, in [*354 the presence of, and attested by, two credible witnesses, &c., and she the said Lena Werninck did thereby, in pursuance of the power of appointment in the first-mentioned indenture mentioned, and in intended execution thereof, will, direct, and appoint, as to and concerning 2000*l.*, parcel of the moneys which at her death should become due and payable by the said Equitable Assurance Office upon or in respect of the said policy of assurance, in manner following, that is to say, that the said sum of 2000*l.* should be settled and be upon the same trusts, and to and for the same intents and purposes, for the benefit of the said wife of the defendant and her children, as were expressed and declared in the said indenture of settlement made in contemplation of her said marriage with the defendant, so far as the rules of law and equity would permit and the said testatrix had the power to direct; but that, if it should be held that she had not the power so to direct and appoint the said sum, then she willed, directed, and appointed that the said sum of 2000*l.* should be paid to the defendant's said wife, or as she should, by any writing or writings under her hand, direct, to and for her own sole and separate use, benefit, and disposal, free from the control, debts, engagements, and intermeddlings of her then present or any future husband; and

the said testatrix thereby appointed the said Spencer Bulkeley Lord Newborough, Thomas Dyke, John Pownall, Thomas James Werninck, and John Spencer Wynn Werninck, executors thereof: That the said Lena Werninck afterwards, to wit, on the 1st of January 1842, died without having altered or revoked her said will; and that the said will was proved in the prerogative court of Canterbury, on the 31st of January, 1842: That, by indenture of the 20th of October, 1842, Thomas Dyke was appointed a trustee *in the place of Henry Hope Werninck: That the

*355] plaintiffs, afterwards, to wit, on the 12th of November, 1842, received and had paid to them, as such trustees, in manner in the indenture hereinafter set forth mentioned, the said sum of 2000*l.* so willed, directed, and appointed to be paid by the said last will as aforesaid, and mentioned in the indenture hereinafter set forth, and which then was property of a personalty nature to which the said Maria Lena, the wife of the defendant, became and was beneficially entitled under and by virtue of the said last will; and the same thenceforth, until the loan hereinafter mentioned, was in the hands of the plaintiffs as such trustees, subject to and charged in equity with the said trusts by and in the said indenture of the 4th of March, 1840, made on the occasion of the said secondly-mentioned marriage, created and contained of and concerning all the right, title, benefit, interest, power, claim, and demand whatsoever of the said Maria Lena Werninck in, to, or out of any fortune or property of a personalty nature, of and to which she might become possessed or beneficially entitled under or by virtue of the last will and testament of her said mother: That afterwards, to wit, on the 12th of November, 1842, the defendant was desirous to procure from the plaintiffs a loan of the said sum of 2000*l.*; and thereupon an indenture was then made by and between the defendant of the first part, the said wife of the defendant of the second part, and the plaintiffs in this suit of the third part,—which said indenture, sealed with the seal of the defendant, the plaintiffs brought into court, &c.,—the tenor of which said indenture follows in these words, that is to say, &c. The deed was then set out *in hæc verba*. It recited the settlement of the 3d of January, 1809; that, in pursuance of the trust therein, a policy for 5000*l.* was effected upon the life of Lena Werninck; that the said Viscount Bulkeley and Henry Hope both died some time before the

*356] *date of the indenture next thereafter recited; that, by indenture dated the 30th of January, 1824, John Scriven and Thomas Dyke were appointed trustees of the hereinbefore recited settlement, in the room and place of the said deceased trustees, and by means of the indenture now in recital, and an indenture endorsed thereon, bearing even date therewith, the said policy, and the moneys which should thereby become payable, amongst the other settled property, were vested in the said John Pownall, John Scriven, and Thomas Dyke, upon the trusts of the hereinbefore recited indenture of settlement; that the said John Scriven had not acted in the trusts of the thereinbefore in part recited

indenture of settlement of the 3d of January, 1809, for some time, and was then resident beyond the seas; that the said John Werninck died in the lifetime of the said Lena Werninck, his wife, without having joined with her in any exercise of the said power of appointment given to them jointly as aforesaid; that there was issue of their said marriage four children, and no more, viz. Henry Hope Werninck, Thomas James Werninck, John Spencer Wynn Werninck, and the said Maria Lena Schröder, all of whom some time since attained the age of twenty-one years. It then recited the indenture of settlement of the 4th of March, 1840, the indenture of the 20th of October, 1842, whereby Thomas Dyke was appointed a trustee of the settlement of the 4th of March, 1840, in lieu of Henry Hope Werninck, and whereby, and by a deed-poll endorsed thereon, the property comprised therein was assigned to and became vested in the said Spencer Bulkeley Lord Newborough, James Edward Shearman, and Thomas Dyke. It then recited that Lena Werninck, by her will, bearing date the 10th of July, 1840, wherein she noticed that the said policy of assurance on her life was then supposed to amount to the sum of 13,525*l.*, did direct and appoint the moneys *which upon her death would become due and payable upon or in respect of the said policy of assurance, in manner following, that [357 is to say, as to several sums making up together 8000*l.*, part thereof, for the benefit of two of her sons as therein mentioned, and she directed and appointed that the sum of 2000*l.*, further part thereof, should be settled and be upon the same trusts, and to and for the same intents and purposes, for the benefit of her said daughter Maria Lena Schröder and her children, as were expressed and declared in the settlement made upon her marriage with the said Ludolf B. Schröder, thereby referring to the indenture last hereinbefore recited of and concerning the property comprised in such settlement, so far as the rules of law and equity would permit, and she the testatrix had the power to direct; but, if it should be held that she had not the power so to direct and appoint the said sum, then she directed and appointed that the said sum of 2000*l.* should be paid to her said daughter, or as she should, by writing or writings under her hand, direct, to and for her own sole and separate use and benefit and disposal, &c.; and the said testatrix appointed the said Spencer Bulkeley Lord Newborough, John Pownall, Thomas Dyke, T. J. Werninck, and J. S. W. Werninck, executors of her said will. It then recited that Mrs. Werninck died in January then last, without having revoked or altered her will, or the appointment thereby made as aforesaid, and that the will was duly proved in the prerogative court of the Archbishop of Canterbury, by the executors (except John Pownall); that the money payable upon the policy, amounting to 13,775*l.*, had then lately been paid by the said Equitable Assurance Office to the said John Pownall, as the surviving trustee named in the said policy, and the same had been received by him for himself and Thomas Dyke as the now acting

*358] trustees under the said settlement of the 3d of January, *1809, that it was considered that Mrs. Werninck had not power to appoint the said sum of 2000*l.* to be settled upon the trusts of the thereinbefore-recited indenture of the 4th of March, 1840, and therefore, that, under the further or substituted appointment made by her of the same sum as aforesaid, the said Maria Lena Schröder became entitled thereto absolutely, for her separate use; but that a question had been made whether the same sum was not included in, or was not subject to, the assignment made by her by the thereinbefore in part recited indenture of settlement of the 4th of March, 1840, as aforesaid, of her right, title, and interest, in, to, or out of property of or to which she might become possessed or beneficially entitled under or by virtue of the last will and testament of her said mother; that therefore the said Maria Lena Schröder, with the approbation of her husband, had proposed and consented that the sum of 2000*l.* should be paid to the said Spencer Bulkeley Lord Newborough, James Edward Shearman, and Thomas Dyke, as trustees as aforesaid, but upon an express agreement and understanding that the same should be held and disposed of by them upon and for the trusts and purposes thereafter declared concerning the same; that they the said Spencer Bulkeley Lord Newborough, James Edward Shearman, and Thomas Dyke had consented to receive and hold and dispose of the same sum of 2000*l.* accordingly, upon having such indemnities from the said Ludolf B. Schröder and Maria Lena Schröder respectively, as were thereafter contained, and which indemnity they had respectively agreed to give; and that the said John Pownall and Thomas Dyke, by the direction of the said Maria Lena Schröder, in writing under her hand, had paid the said sum of 2000*l.* unto the said Spencer Bulkeley Lord Newborough, James Edward Shearman, and Thomas Dyke, as such

*359] *trustees as aforesaid, and the same was then in their hands, as they did thereby acknowledge. The indenture then witnessed, that, in pursuance of the said recited agreement in that behalf, and in consideration of the premises, it was thereby agreed and declared between and by the parties to those presents, and particularly by the said Spencer Bulkeley Lord Newborough, James Edward Shearman, and Thomas Dyke, and the said Maria Lena Schröder, by that writing under her hand, did expressly order and direct, that the said Spencer Bulkeley Lord Newborough, James Edward Shearman, and Thomas Dyke, and the survivors and survivor of them, or other the trustees or trustee for the time being of those presents, and their or his respective executors and administrators, should and would henceforth stand and be possessed of and interested in the said appointed sum of 2000*l.*, and the securities and stocks and funds in or upon which the same sum, or any part thereof, might from time to time be invested or laid out as thereafter mentioned, and the interest, &c., upon and for the trusts and purposes, and with, under, and subject to the powers, provisoes, agreements, and decla-

rations thereafter declared and contained and referred to of and concerning the same respectively, that is to say, upon trust that the trustees or trustee for the time being of those presents, and their or his executors or administrators, did and should, from time to time, upon the request in writing of the said Ludolf B. Schröder, but, during the life of the said Maria Lena Schröder, not without her request and consent, to be testified by some writing under her hand, lend and advance the said sum of 2000*l.*, or any moneys, stocks, or funds for the time being held in the place thereof upon the trusts of those presents, or any part or parts thereof respectively, to the said Ludolf B. Schröder, for such time as he should request, or generally, at *interest, upon the security of his bond, &c. ; and did and should,—subject and without prejudice to the trusts thereinbefore declared,—stand possessed of and interested in the said sum of 2000*l.*, or the securities, stocks, or funds for the time being held in the place thereof under the trusts of those presents, upon and for such and the same trusts, intents, and purposes, and with, under, and subject to such and the same powers, provisoes, declarations, and agreements as were by and in the thereinbefore recited indenture of the 4th of March, 1840, declared or expressed and contained of and concerning the foreign stock and other property thereby settled as aforesaid, or such or so many of the same trusts, &c., as were then subsisting or capable of taking effect, or as near thereto as the different circumstances of the case would permit: Provided always, and it was thereby expressly declared, that, if, according to the true construction of the said indenture of the 4th of March, 1840, the said appointed sum of 2000*l.* ought to be vested in and held and applied by the trustees of the same indenture, upon and for the trusts and purposes thereof, then and in such case those presents should not operate or be construed so as to make any additional provision for the persons interested under the trusts of the last-mentioned indenture, but all interests which might be taken by them under or by virtue of those presents should, to the extent thereof, be taken in satisfaction and discharge of the provisions made for the same persons respectively by the last-mentioned indenture: And the indenture also witnessed, that, in performance of the said recited agreement in that behalf, the said Ludolf B. Schröder, for himself, his heirs, executors, and administrators, did thereby covenant and agree with the said Spencer Bulkeley Lord Newborough, J. E. Shearman, and Thomas Dyke, jointly and severally, and their respective heirs, executors, administrators, and assigns, that he, the said Ludolf B. *Schröder, his heirs, executors, or administrators, should and would, from time to time, and at all times thereafter, save, defend, keep harmless, and indemnify the said Spencer Bulkeley Lord Newborough, J. E. Shearman, and Thomas Dyke, and every of them respectively, and their and every of their heirs, executors, and administrators, and their several estates and effects whatsoever, from and against and in respect of all and all manner of actions, suits, claims, and demands

whatsoever, whether at law or in equity, or otherwise howsoever, by any person or persons who is or are, or hereafter shall or may be, in any manner interested or entitled under or by virtue of the thereinbefore-recited indenture of the 4th of March, 1840, or any of the trusts or provisions thereof, and who should claim adversely to those presents, and not under or by virtue of the same, for or on account or in respect of the said appointed sum of 2000*l.*, and the stocks, funds, and securities in or upon which the same might thereafter be laid out or invested, or any part or parts thereof respectively, and the interest or dividends and annual produce of the same sum, stocks, funds, and securities, or any part thereof respectively, or on account or by reason of any such loan or investment as was thereinbefore directed or authorized to be made of the said sum of 2000*l.*, or the stocks and funds for the time being held upon the trusts of those presents, or any part thereof respectively, and from and against and in respect of all sums of money, damages, losses, costs, charges, and expenses whatsoever which they the said Spencer Bulkeley Lord Newborough, J. E. Shearman, and Thomas Dyke, or any of them, or their or any of their heirs, executors, or administrators, should or might pay, sustain, incur, or be put into, by means or in consequence of any such action, suit, claim, or demand as aforesaid, or *362] in relation thereto; and that, *in pursuance of the said recited agreement in that behalf, and in consideration of the premises, the said Maria Lena Schröder did thereby agree and declare and direct that all the property, estate, and effects, whatsoever and wheresoever, to which she then was, or at any time or times thereafter should or might be, entitled for her separate use, independent of her said husband, should be liable to, and chargeable and charged with, the payment and satisfaction of all damages which might at any time or times thereafter be recovered or recoverable upon or by virtue of the covenants or covenant of the said Ludolf B. Schröder thereinbefore contained, nevertheless, as between herself and her said husband and his representatives and estates and effects, as a secondary or auxiliary fund only, in aid of the estate and effects or assets of the said Ludolf B. Schröder, &c. The declaration then proceeded to state that the plaintiffs did, afterwards, and whilst they were such trustees as aforesaid, to wit, on the day and year last aforesaid, upon the request in writing of the defendant, then, and during the life of his said wife, made to the plaintiffs, and at the request, and by the consent of the defendant's said wife, testified by a writing then made by her under her hand, lend and advance the said sum of 2000*l.* thereinbefore and in the last-mentioned indenture mentioned, to the defendant, upon the security of a certain indenture then made between the defendant of the first part, his said wife of the second part, and the plaintiffs of the third part,—profert,—whereby the defendant did covenant with the now plaintiffs that he would, in satisfaction and discharge of the same sum, well and truly pay or cause to be paid

unto the plaintiffs the said sum of 2000*l.*, and interest at 5 per cent. thenceforth so long as the same should remain owing; provided that, so long as the defendant should remain solvent, or apparently solvent, and should *well and truly pay or satisfy the interest which should grow due upon the said 2000*l.*, or so much thereof as should remain owing [*368 unto the plaintiffs, their executors or administrators, or on their account to the said Maria Lena Schröder, for her separate use, as and when such interest should become due, or within the space of one calendar month afterwards, or otherwise satisfy his said wife from time to time in respect of the same interest, it should not be lawful for the plaintiffs to call in or require payment of the said principal sum of 2000*l.*, or any part thereof, unless at the request in writing of the said Maria Lena Schröder: that the 2000*l.* and interest, or any part thereof, never had been paid to the plaintiffs, but remained wholly unpaid to them or any other person, and the plaintiffs, by reason of the said loan thereof, became and were liable in equity to be sued by any future trustee of the said trusts in the said indenture of the 4th of March, 1840, made upon the occasion of the said secondly-mentioned marriage contained, and to be compelled to pay or invest the same as thereafter mentioned. The declaration then set out an indenture of the 24th of September, 1845, to which the defendant and his wife were parties, whereby Thomas James Werninck, Thomas Stephens, and Henry Hope Werninck were appointed trustees of the settlement of the 4th of March, 1840, in the place of the plaintiffs, and which contained a proviso that the said covenant and other provisions of indemnity contained in the said indenture of the 12th of November, 1842, should remain in full force, and should at all times be available by the plaintiffs and each of them respectively, and their respective heirs, executors, and administrators, as fully and effectually as if these presents had not been made or executed. Averment, that thereupon and thereby the said Thomas James Werninck, Thomas Stephens, and *Henry Hope Werninck then became and were trustees of and for the execution of the trusts contained in the said indenture [*364 dated the 4th of March, 1840, made upon the occasion of the said secondly-mentioned marriage, and bound to take care of the due security and investment of the property charged with and subject to those trusts: That afterwards, and before this suit, to wit, on the 1st of January, 1846, the said Thomas Stephens, then being such trustee as aforesaid, and then, as such, interested and entitled under and by virtue of the said indenture of the 4th of March, 1840, and the trusts and provisions thereof, and claiming adversely to the said indenture of the 12th of November, 1842, and not under or by virtue of the same, affirmed and insisted that the said loan of the said sum of 2000*l.* by the plaintiffs to the defendant, was a breach of the trusts in the said indenture of the 4th of March, 1840, contained, and then claimed and demanded of the plaintiffs that the said sum of 2000*l.* should be paid by the plaintiffs to the said Thomas

Stephens and his said co-trustees, or that so much 3 *per cent.* consolidated bank annuities as the same would have purchased on the 12th of November, 1842, when it was lent to the defendant as aforesaid, should be transferred by the now plaintiffs into the names of the said Thomas Stephens and his said co-trustees, to be holden by them upon the trusts of the said indenture of the 4th of March, 1840: That the said Thomas Stephens, being such trustee as aforesaid, and interested and claiming as aforesaid, afterwards, and before the commencement of this suit, to wit, on the 14th of March, 1846, for enforcing his said claim and demand, commenced and prosecuted a suit in the high court of Chancery, wherein the said Thomas Stephens was plaintiff, and the now plaintiffs, the now defendant, Maria Lena Schröder, his wife, Thomas James Werninck, Henry Hope *365] *Werninck, Ludolf Adrian Schröder, a child of the said marriage between the defendant and his said wife, and Wilhelmina Susan Schröder, another child of the same marriage, were defendants; that, in and by the said bill, the said Thomas Stephens alleged, amongst other things, that the plaintiffs had been guilty of a breach of trust in having so as aforesaid made the said loan of the said sum of 2000*l.* to the defendant, and he thereby prayed that the defendants thereto might answer the same, and that, if, and so far as, that court should think right, the trusts of the said indenture of settlement of the 4th of March, 1840, might be carried into execution by and under the decree and direction of that court, and that it might be declared that the said sum of 2000*l.* was comprised in the trusts of the said indenture, and that the defendants Ludolf B. Schröder, and Maria Lena his wife, Spencer Bulkeley Lord Newborough, J. E. Shearman, Thomas Dyke, T. J. Werninck, and Henry Hope Werninck, might be declared to be jointly and severally liable to replace the said sum of 2000*l.*, upon the trusts of the said indenture of settlement, and that, for that purpose, the said last-named defendants might be decreed to purchase so much stock in the 3 *per cent.* consolidated bank annuities as the said sum of 2000*l.* would have purchased on the 12th of November, 1842, the time when such sum of money was so lent to the defendant Ludolf B. Schröder as thereinbefore was mentioned, or that they might be decreed to repay the said sum of 2000*l.*, as should appear to be most beneficial to the infant *cetteux que trust* interested under the said indenture of settlement, and that such stock or sum of money might be duly invested and secured upon the trusts of the said indenture of settlement, or that the respective life-interests of the said defendants Ludolf B. Schröder and Maria Lena his wife, in all the stocks, *366] moneys, *funds, securities, and premises comprised in the said indenture of settlement might be decreed to be applied, so far as the same would extend, in making good the said stock, or the said 2000*l.*, and that the deficiency thereof might be decreed to be replaced or repaid by the defendant Ludolf B. Schröder and Maria Lena his wife, Spencer Bulkeley Lord Newborough, J. E. Shearman, and Thomas Dyke, T. J

Werninck, and Henry Hope Werninck, and that the plaintiff Thomas Stephens might be discharged from the trusts of the said indenture of settlement, and also from the trusts of the said indenture of the 12th of November, 1842, if the court should be of opinion that he had accepted the same free from all liabilities in respect of such trusts or other the matters aforesaid, and that, if necessary, new trustees might be appointed of all the said last-mentioned indentures, in the place of the plaintiff Thomas Stephens, the said T. J. Werninck and Henry Hope Werninck, and that all necessary and proper directions might be given for effectuating the several purposes aforesaid, and that the defendants Ludolf B. Schröder and Maria Lena his wife, and Spencer Bulkeley Lord Newborough, J. E. Shearman, Thomas Dyke, T. J. Werninck, and Henry Hope Werninck might be decreed to pay to the said plaintiff Thomas Stephens his costs of that suit, and also certain costs, charges, and expenses incurred by him in relation to the matters aforesaid; and for further relief: That afterwards, and pending the said suit, and in the course of and as part thereof, and before this suit, to wit, on the 7th of December, 1846, presented to the Master of the Rolls, and thereby prayed that the now plaintiffs might be ordered within a week after the service of the order to be made upon that petition, to transfer into the name and with the privity of the accountant-general of the said court of Chancery, to the credit of the said cause, *as much three per cent. consolidated bank annuities as might have been purchased with the said 2000*l.* on the 12th of November, 1842, and that the petitioner might be discharged from the trusts of the said indenture of settlement of the 4th of March, 1840, and also from the trusts of the said indenture of the 12th of November, 1842, if, and so far as, the said court should be of opinion that the petitioner had accepted the same, and that it might be referred to the master to appoint a proper person to be a trustee or trustees respectively of the said indentures, and to settle and approve of proper deeds for that purpose, the petitioner thereby undertaking to execute the same, and also to settle and approve of a proper release and indemnity to the petitioner, and that all proper parties might be ordered to join in and execute the same, and that it might be referred to the master to tax the petitioner his costs, charges, and expenses of and incidental to the said trust, and also his costs of the said suit as between solicitor and client, and that the now plaintiffs and the said Ludolf B. Schröder and Maria Lena his wife might be jointly and severally ordered to pay to the petitioner the amount of such costs, charges, &c., when so taxed as aforesaid, or that his lordship might be pleased to make such further or other order in the premises as to his lordship might seem meet,—of all which premises, the defendant, afterwards, to wit, on the 4th of January, 1847, had notice: That thereupon, the now plaintiffs, being advised, as the fact was and is, that they had no defence to the said suit of the said Thomas Stephens, then gave

notice to the now defendant, stating that the said petition would come on to be heard before the Master of the Rolls on or about the 11th of January, then instant, and that, unless the now defendant came forward and took upon himself the defence of the said suit in Chancery, and gave to

*368] *the now plaintiffs a good and sufficient indemnity against all costs to be paid, incurred, or sustained by such defence, they would settle the claim of the said Thomas Stephens in the said suit, by consenting to such order being made upon the said petition as the said court might think proper, and would call upon and hold the now defendant and Maria Lena Schröder, under the indemnity aforesaid, liable to make good and reimburse to them all sum or sums of money, costs, charges, and expenses which they the now plaintiffs, or either of them, might bear, sustain, or be put unto, by reason or in consequence of the claim of the said Thomas Stephens, or of the said suit in Chancery so instituted by him as aforesaid; that the now defendant then neglected and declined to take upon him the defence of the said suit, or to indemnify the now plaintiffs against the same, or the costs of their defence thereto; that such proceedings were thereupon had in the said suit, that the now plaintiffs, in order to compromise and put an end to the same, and to prevent further costs and expenses being incurred therein, upon the hearing of the said petition, before this suit, to wit, on the 26th of January, 1847. reasonably and properly consented to such order being made upon the said petition as the said court of Chancery might think proper; that it was thereupon, and before this suit, to wit, on the day and year last aforesaid, ordered by the said Master of the Rolls, that, it appearing that it would be for the benefit of the parties beneficially entitled, to have stock, rather than the proceeds of the sale thereof in the petition mentioned, that the now plaintiffs should, on or before the 27th of March, 1847, transfer into the name and with the privity of the accountant-general of that court, in trust in that cause, as much 3l. per cent. consolidated bank annuities as might have been purchased with the said sum of 2000l.

*369] *on the 12th of November, 1842, the amount of such bank annuities so to be purchased, to be verified by affidavit, and the said accountant-general was to declare the trust thereof accordingly, subject to the further order of that court; and that it should be referred to the master to tax the petitioner his costs, charges, and expenses of and incidental to the said trust, and also his costs of the said suit, as between solicitor and client, up to that time, including the costs of that application, and also to tax the costs, charges, and expenses properly incurred by the now plaintiffs in the said trust, not including any costs relating to the said breach of trust; and that the now plaintiff should be at liberty to apply to that court as to such last-mentioned costs, charges, and expenses, as they might be advised; and that the now plaintiffs should pay to the petitioner the amount of his aforesaid costs, charges, and expenses when so taxed, and that they should be at liberty to apply to

the court touching the said costs, charges, and expenses as they might be advised; and that thereupon and thereby the plaintiffs then became liable to, and did, in obedience to the said order, before this suit, to wit, on the 1st of March, 1847, procure, and transfer into the name of the said accountant-general of the court of Chancery to the credit of the cause, 212*l.* 16*s.* 8*d.* of three per cent. consolidated bank annuities, and, for and about so transferring the same, were put to the expense and loss of a large sum of money, to wit, 2500*l.*; and that the now plaintiffs also, by reason of the premises, and of the defendant's not indemnifying them pursuant to his said covenant, before this suit, to wit, on the day and year last aforesaid, became liable to pay to the said Thomas Stephens a large sum, to wit, 600*l.*, for his costs and charges of his said suit, and otherwise; and the now plaintiffs also, by means of the premises, and of the defendant's not indemnifying them pursuant to his said *covenant, before this suit, incurred and were put to, and became liable to [*370 pay, not only the said moneys which they were obliged to and did lay out in procuring and transferring the said three per cent. consolidated bank annuities, but also divers other moneys, to wit, 500*l.*, for their costs and expenses in and about procuring themselves to be advised respecting the said claim and their defence thereto, and in and about their defence to the said suit, and the compromise thereof; and by means and in consequence thereof, &c.

To this declaration the defendant demurred specially, assigning for causes,—that no profert is made of the several indentures therein respectively mentioned to have been made on the 8d of January, 1809, the 4th of March, 1840, the 20th of October, 1842, or any or either of such indentures, nor is any excuse for profert of the said indentures respectively, stated in the declaration;—that the indenture of the 4th of March, 1840, did not operate as an assignment of any fortune or property of a personal nature of or to which the said Maria Lena Werninck might thereafter become possessed or beneficially entitled, under or by virtue of the last will and testament of her said mother Lena Werninck (who was then living), nor of any future right, title, interest, benefit, power, claim, or demand whatsoever, of her the said Maria Lena Werninck in, to, or out of any such fortune or property as last aforesaid; and particularly that the said indenture did not operate as an assignment of the said sum of 2000*l.* mentioned in the said will of the said Lena Werninck, in the declaration alleged to have been made on the 10th of July, 1840; and that the said indenture was and is illegal, void, and inoperative in the above respects, and particularly as to the said sum of 2000*l.*;—that, if the said indenture operated as a covenant to assign the said future property, or in any other manner than as a legal assignment thereof, it ought to *have been pleaded according to its legal operation and effect, and not as an assignment, so far as regards such [*371 future property as aforesaid;—that the said indenture did not apply to.

comprise, or include the said sum of 2000*l.* mentioned in the said will of the said Lena Werninck, because the said Maria Lena, the wife of the defendant, became possessed of, and beneficially entitled to, that sum under and by virtue of the indenture of settlement of the 3d of January, 1809, in the declaration mentioned, and the appointment made in pursuance thereof by the said will of the said Lena Werninck, and not merely under or by virtue of the said will;—that the said will of the said Lena Werninck,—so far as it purported to direct or appoint that the said sum of 2000*l.* therein mentioned, should be settled and be upon the same trusts, and to and for the same intents and purposes for the benefit of the said wife of the defendant and her children, as were expressed and declared in the said indenture of settlement made in contemplation of her said marriage with the defendant, so far as the rules of law and equity would permit, and the said testatrix had power to direct,—did not operate as a valid and effectual execution of the powers or authority vested in the said testatrix in and by the said indenture of settlement of the 3d of January, 1809;—that the other alternative mentioned in the said testatrix's will, whereby she willed, directed, and appointed that the said sum of 2000*l.* should be paid to the defendant's said wife, or as she should by any writing or writings under her hand, direct, to and for her own sole and separate use, benefit, and disposal, free from the control, debts, &c., of her then present or any future husband, took effect; and that the said sum of 2000*l.*, for the reasons aforesaid, was not subject to, and charged in equity with, the said trusts of the indenture of settlement of the 4th of March, 1840;—that the

*372] *said indenture in the declaration mentioned to have been made on the 20th of October, 1842, and the deed-poll then endorsed thereon, were not, nor was either of them, sufficient to vest in the plaintiff, Thomas Dyke, a joint interest with the other plaintiffs, in the whole of the said sum of 2000*l.*, nor did the plaintiffs then become joint trustees thereof, as alleged in the declaration;—that it appears that the plaintiffs received, and had paid to them, the said sum of 2000*l.*, not as trustees, for the time being, of the indenture of settlement in the declaration mentioned to have been made on the 4th of March, 1840, but under or by virtue of the indenture of the 12th of November, 1842; and that, under the circumstances aforesaid, the plaintiffs were fully justified and authorized to lend and advance the said sum of 2000*l.* to the defendant, with the consent in writing of his said wife, in manner and form as stated in the said secondly-mentioned indenture of the 12th of November, 1842;—that it does not sufficiently appear that the plaintiffs, by reason of the said loan, under the circumstances aforesaid, became or were liable in equity to be compelled, without their own consent, and against their will, to pay or invest the amount of the said loan, as stated in the declaration;—that the said petition presented to the Master of the Rolls on the 7th of December, 1846, was an *ex parte*

proceeding, and the prayer of such petition could not have been complied with, except by the consent of the plaintiffs;—that, although it is stated in the declaration that the defendant, on the 4th of January, 1847, had notice of the premises in the declaration mentioned, it was not stated that he had any notice that the now plaintiffs had no defence to the said suit in the declaration mentioned, nor that the now plaintiffs had been so advised; and that the subsequent notice from the now plaintiffs to the now defendant, in the declaration mentioned *(stating, amongst other things, that the said petition would come [373 on to be heard on the 11th of January then instant), was not sufficiently precise, and was a bad, defective, and insufficient notice, in divers respects, and required too much of the defendant, and did not sufficiently specify the nature of the indemnity then required from him;—that it does not sufficiently appear in or by the declaration, that, according to the course and practice of the court of chancery, the now defendant could, when so required as aforesaid, have come forward and effectually taken upon himself the defence of the said suit (supposing a good defence thereto then really existed), nor how and in what manner he could have put in an answer for the now plaintiffs in the said suit, or otherwise defended the same on their behalf, nor that a reasonable opportunity was offered him for that purpose, nor that a reasonable time elapsed after he had such last-mentioned notice, and before the now plaintiffs consented to such order being made as in the declaration mentioned to have been made on the 26th of January, 1847, nor that the defendant, for an unreasonable and improper time, neglected or declined to take upon him the defence of the said suit, or to indemnify the now plaintiffs against the same, or the costs of their defence thereto;—that the said order of the 26th of January, 1847, was made with the consent of the now plaintiffs, and that in the stage of the cause in which such order was made (no answers appearing to have been put in by any of the defendants), such order could not have been made without the consent of the now plaintiffs; and that, although it is alleged in the declaration that the now plaintiffs reasonably and properly consented to such order being made upon the said petition, it does not sufficiently appear in or by the said declaration, that such consent was reasonable and *pro- [374 per, or how and why it was reasonable and proper;—that all the loss, damage, and injury which the plaintiffs are, in the said declaration, alleged to have sustained, appears to been caused or occasioned by their own consent, and to have resulted from their own act, and not merely by reason of anything from which the defendant covenanted to indemnify them, as in the declaration mentioned, nor from any breach of such covenant on the part of the defendant;—and that the indenture of the 12th of November, 1842, is void and illegal, for containing a covenant to indemnify and save harmless the plaintiffs against a breach of trust and breach of duty in their character of trustees, &c.

The plaintiffs joined in demurrer.

The demurrer was argued in Trinity term last, before WILDE, C. J., COLTMAN, J., MAULE, J., and CRESSWELL, J.

June 6, 7, 1848. *Petersdorff*, in support of the demurrer. By the deed of the 3d of January, 1809,—the settlement made upon the marriage of Dr. Werninck with Magdalena Wynn,—it was provided that a policy should be effected with the Equitable Assurance Office, for 5000*l.*, upon the life of Magdalena Wynn, and kept on foot by the trustees; and that the proceeds of such policy should be received and held by the trustees, in trust for such of the children of the marriage, if more than one, in such shares as the husband and wife jointly, or the survivor of them, should appoint, and, in default of appointment, to all the children equally. The next deed set out in the declaration, is, a settlement made on the marriage of the defendant with Maria Lena Werninck, a daughter of Dr. and Mrs. Werninck, dated the 4th of March, 1840; by which deed,—reciting that the proposed marriage of Dr. and Magdalena Werninck had been had and solemnized, and that *375] Dr. Werninck had died, leaving his wife *surviving, without having joined in any appointment under the settlement, and that there were four children of the marriage, of which she the said Maria Lena Werninck was one,—she the said Maria Lena Werninck, with the consent of her intended husband (the defendant), assigned all her right and interest in and to any fortune to which she might become entitled under the will of her mother, to trustees (one of whom was Lord Newborough), upon trust for the separate use of her the said Maria Lena Werninck for life, and upon further trust for the children of the intended marriage, as the defendant and his wife should appoint. At this time, the mother was living. These two deeds are introduced as disclosing the title and interest of the plaintiffs, and not as mere inducement to the statement of the deed the breach of which is complained of. The plaintiffs, therefore, were bound to make profert of them, or to show matter dispensing with profert. On the 10th of July, 1840, Mrs. Werninck made a will, whereby she sought to exercise her power of appointment; and under this will Lord Newborough and Thomas Dyke (two of the plaintiffs) were appointed executors. Dyke is also a trustee under the deed of the 12th of November, 1842. It is perfectly clear, therefore, that these are documents which are in the plaintiff's possession, or the production of which they are in a position to enforce. [CRESSWELL, J. There might be some foundation for your argument, if this were the action of the new trustees, and not an action by the old trustees upon the covenant of indemnity.] In *Jenkin v. Peace*, 6 M. & W. 722, it was held, that, in pleading a conveyance by lease and release, profert must be made of the *release*.(a) Upon the discussion of that

(a) That is so where the legal estate is suffered to remain in the releasee. But, where the release is, to the bargainee for a year (or to any other lessee), to the use of a third person, in whom the use is executed, *cestui que use*, and those claiming under him, are not bound to make profert of the release, which is presumed to be in the hands of the releasee to uses.

case, all *the older authorities were noticed. The first of these is the 452d section of Littleton, where it is said that "every release made to him which hath a reversion or a remainder in deed, shall serve and aid him who hath the freehold, as well as to him to whom the release was, *if the tenant hath the release in his hand to plead.*" In § 453 it is said "In the same manner it is, where a release is made to the tenant for life, or to the tenant in tail, this shall enure to them in the reversion, or to them in the remainder, as well as to the tenant of the freehold; and they shall have as great an advantage of this, *if they can show it.*" In Dr. Leyfield's case, 10 Co. Rep. 92, the rule is laid down thus, that, "if he who is party or privy in estate or interest, or he who justifies in the right of him who is party or privy, pleads a deed, although he who is privy claims parcel of the original estate, yet he ought to show the original deed to the court; and the reason that deeds, being so pleaded, shall be shown to the court, is, that to every deed two things are requisite and necessary,—the one, that it be sufficient in law, and that is called the legal part, because the judgment of that belongs to the judges of the law,—the other concerns matters of fact, sc. if it be sealed and delivered as a deed, and the trial thereof belongs to the country: and therefore every deed ought to approve itself, and to be proved by others: approve itself to the satisfaction of the court in three manners,—first, as to the composition of the words, to be sufficient in law, and the court shall judge that,—2d, that it be not rased or interlined in material points or *places, and upon that also the judges in ancient times did judge upon their own view the deed to be void, but of late times have left that to the jury, (to say,) if the rasing or interlining were before delivery,—3d, that it may appear to the court and the party, if it were upon condition, limitation, or with power of revocation, &c., to the intent, that, if there be a condition, &c., if the deed be poll, or if there wants a counterpart of the indenture, the other party may take advantage of it." In *Hodgson v. Warden*, 13 M. & W. 22, which is a very strong case, it was held, that it is not a sufficient excuse for the want of profert of a deed, under which the party pleading it claims a benefit, *e. g.* an assignment by him to trustees for the benefit of creditors, with a provision that he should be released from his debts on payment of a certain composition,—that there was but one part of the deed executed, and that the same did not belong to the defendant (the party pleading it); that he had no right to the same, nor had the custody of, or any power or control over it, and was unable to procure the possession, power, or control of it; that it always had been in the possession of the trustees, who refused to permit the defendant to have the possession thereof, or to bring it into court. POLLOCK, C. B., there says: "The refusal of the trustees to permit the defendant to have this deed for the purpose of making profert of it, may render them liable in damages to the defendant, but will not warrant us in departing

from the settled rules of law, which were made, not for the vexation of parties, but for very sound reasons." The authorities are all collected in the notes to *Jevens v. Harridge*, 1 Wms. Saund. 8 b. Reliance will be placed, on behalf of the plaintiff, on *Dangerfield v. Thomas*, 9 Ad. *378] & E. 292, 1 P. & D. 207, and *Bain v. *Cooper*, 8 M. & W. 751. But, in both these cases, the parties who held the instrument, held it adversely to the plaintiff. They do not, therefore, at all impugn the rule laid down in the cases before cited. [MAULE, J. Profert is excused, where there is some impossibility or some insuperable difficulty in the way of the production of the instrument by the party pleading it, without any fault of his own.] The question here is, whether the mere voluntarily parting with the deed by assignment, excuses the plaintiffs from making profert of it, where they are seeking to obtain a benefit under it.

The declaration discloses no breach of trust on the part of the plaintiffs, in lending the 2000*l.* to the defendant; for, the money never was, in point of law, subject to the trusts of the deed of the 4th of March, 1840. It is submitted,—first, that Mrs. Werninck's will was not a proper exercise of the power,—secondly, that the settlement of the 4th of March, 1840, did not legally pass the 2000*l.* to the trustees, because the defendant's wife took that sum, not under her mother's will, but under the settlement of the 3d of January, 1809,—thirdly, that the 2000*l.* did not pass to the trustees under the settlement of the 4th of March, 1840, because an assignment of future property to be derived under the will of a living person, is void and inoperative. 1. By the deed of the 3d of January, 1809, the power to appoint is, "in favour of an only child, or for all and every, or for any one or more, exclusive of the rest, of the children of the said intended marriage, if there should be more than one." Mrs. Werninck, who survived her husband, affects by her will to give effect to that power. By this will, which is dated the *379] 10th of July, 1840, the testatrix directed and appointed that *the sum of 2000*l.* should be settled "upon the trusts declared in the indenture of settlement of the 4th of March, 1840, so far as the rules of law and equity would permit, and the testatrix had power to direct and appoint, but that, if she had not such power, then she willed, directed, and appointed that the said sum of 2000*l.* should be paid to the defendant's wife, or as she, the defendant's wife, should by writing direct and appoint." The trusts of the deed of the 4th of March, 1840, were in favour of the children of that marriage. Now, it is perfectly established, that a power to appoint to *children*, will not authorize an appointment to *grandchildren*: *Alexander v. Alexander*, 2 Vez. sen. 640; *Bristowe v. Ward*, 2 Ves. jun. 836; *Whistler v. Webster*, 2 Ves. jun. 367; *Smith v. Lord Camelford*, 2 Ves. jun. 698; *Crompe v. Barrow*, 4 Ves. 681; *Adams v. Adams*, Cowp. 651; *Brudenell v. Elwes*, 1 East, 442, 7 Ves. 882; *Butcher v. Butcher*, 9 Ves. 382. The trustees, therefore, could not

be guilty of any breach of trust, in paying the 2000*l.* under the wife's direction. 2. The indenture of the 4th of March, 1840, only professes to assign what would pass under the will of Mrs. Werninck. If, therefore, Mrs. Schröder takes the 2000*l.*, as it is submitted she does, under the settlement of the 3d of January, 1809, the trustees did not take it as trustees under the settlement of the 4th of March, 1840. The rule of law is, that, where a party has a mere power of appointment to particular persons or to a class of persons, those persons take under the power, and not under the execution of it. [MAULE, J. That proposition is more tenable with respect to realty than personalty. In the case of realty, the appointment executes the use. But the statute of uses does not apply to *personalty.] The difficulty is, that, without the will, there is no specific sum [*380 appointed. 3. The settlement of the 4th of March, 1840, professes to assign to the trustees whatever interest Mrs. Schröder might derive under the will of her mother. The will bears date four months after the execution of the settlement. The settlement, therefore, could not operate upon property derived under the will; for, there can be no valid assignment of a future contingent interest under the will of a living person. In *Robinson v. Macdonnell*, 5 M. & S. 228, it was held, that an assignment of the freight, earnings, and profits of a ship, does not extend to profits not in existence, actually or potentially, at the time of the assignment: where, therefore, C. assigned by deed to S. the freight, earnings, and profits of the ship *W.*, which ship afterwards, in a voyage to the South Seas, obtained a quantity of oil, the produce of whales taken in that voyage,—it was held that this oil did not pass to S. by the assignment; for, the assignor had no property, actual or potential, in the oil, at the time of the assignment, and the voyage was not then contemplated. [MAULE, J. The restriction here rather differs this from the case of property quite at large.] The recent statute which authorizes the conveyance by deed of contingent interests,^(a) is not applicable to personalty. In *Lunn v. Thornton*, 1 Man., Gr. & S. 379, it was held by this court that a grant of goods which are not in existence, or which do not belong to the grantor at the time of executing the deed, is void, unless the grantor ratify the grant by some act done by him with that view, after he has acquired the property therein. And that doctrine is confirmed by the Court of Queen's Bench, in *Gale v. Burnell*, 7 Q. B. 850. The assignment, therefore, in the lifetime of Mrs. Werninck, having no operation [*381 upon the 2000*l.*, the plaintiffs never became trustees of that fund.

The deed of the 4th of March, 1840, ought to have been pleaded according to its legal effect: and its legal effect, under the circumstances, would be, not an absolute assignment of the 2000*l.*, but a covenant to assign it. PARKE, B., in delivering the judgment of the court, in *Price v. Williams*, 1 M. & W. 6, says: "There is no doubt but that, in deduc-

(a) 8 & 9 Vict. c. 106, s. 3,—which is a substitution for the 5th section of the 7 & 8 Vict. c. 76.

ing title, it is the established rule that conveyances are to be pleaded as they operate; for which several authorities were cited,^(a)—to which that of *Moore v. The Earl of Plymouth*, 5 B. & Ald. 70^(b) may be added."

Mrs. Schröder having,—as is recited in the deed of the 12th of November, 1842,—expressly sanctioned the loan of this money to her husband, the trustees, in lending it, committed no breach of trust. To render the defendant liable under his covenant to indemnify, it must appear that the payment was made by the trustees in the ordinary course of law, and under circumstances which made it compulsory on them to pay. If they had resisted Stephens's claim, they must have succeeded; and they cannot shelter themselves under the notice given to the defendant to come in and defend. The payment was a voluntary payment by them in their own wrong.

Assuming that the trustees were guilty of a breach of trust, can the court give effect to a deed to indemnify against an admitted breach of trust? The case might be different, if the breach were doubtful: there *382] the *covenant to indemnify might probably be enforced. Here, however, the matter could not be doubtful: *Warwick v. Richardson*, 10 M. & W. 284.

Channell, Serjt. (with whom was *Willes*), *contrd.* The question upon the merits, is, whether or not there is any objection in point of law, to the deed declared on; and, if not, whether the declaration shows any breach of the covenant to indemnify contained therein. The short outline of the case is this:—On the 3d of January, 1809, Dr. Werninck married Magdalena Wynn. Under the settlement made on that occasion, three trustees were appointed. In 1825, there was a change of trustees, and Thomas Dyke, one of the plaintiffs, then became one of the trustees under the original settlement. In March, 1840, the defendant married Maria Lena Werninck, the daughter of Dr. and Magdalena Werninck, and Lord Newborough, another of the plaintiffs, became a trustee. In October, 1840, there was an assignment to new trustees, Thomas Dyke being one of them. The settlement of the 3d of January, 1809, had provided for effecting a policy for 5000*l.* in the Equitable Assurance Office; and the deed contained a power to the Dr. and Mrs. Werninck, or to the survivor, to appoint that sum in favour of the children of the marriage. Mrs. Werninck, who survived her husband, by her will, dated the 10th of July, 1840, purported to make a disposition of this property; and, in the course of that year, she died. The money receivable under the policy, would be paid by the office only to the trustees of the original settlement. The money having come to the hands of the plaintiffs, as trustees under the settlement of the 4th of March, 1840,

(a) *Chester v. Willan*, 2 Saund. 97; *Mornington v. William*, 1 Ventr. 109; *Osmere v. Sheafe*, Carth. 308.

(b) And see 5 Mann. & Ryl. 451, 3 M. & G. 780, 4 M. & G. 710 n.

the defendant, with the assent of his wife, proposed to borrow the 2000*l.* from the trustees; but, some doubt arising whether they were *authorized to lend it, the trustees took from the defendant the [*383 covenant of indemnity upon which this action is founded. On the 4th of September, 1845, other trustees of the settlement of the 4th of March, 1840, were appointed in lieu of the plaintiffs. Thomas Stephens, one of the newly-appointed trustees, being made acquainted with the loan to the defendant of the trust fund before referred to, filed a bill against the plaintiffs, the defendant and his wife, and others, and presented a petition to the Master of the Rolls, praying that the plaintiffs might be ordered to refund the trust moneys so alleged to have been misapplied. Notice of the suit having been given to the defendant, and he declining to take the defence upon himself, the present plaintiffs allowed Stephens to take a decree against them, and now call upon the defendant to indemnify them, pursuant to his covenant.

The first objection to the declaration is, that the plaintiff makes no profert of the indentures of the 3d of January, 1809, the 4th of March, 1840, and the 20th of October, 1842. The short answer to that objection, is, that those deeds are set out as matter of *inducement* only, and therefore no profert of them was necessary. The substantial ground of action is, the breach of the defendant's contract of indemnity. Profert is only required to be made of such deeds as the party pleading may ordinarily be supposed to have in his possession or power. Many of the authorities upon this subject are collected in the notes in 1 Wms. Saund. 8, 9, where it is said, that, "where a person has no right to the possession of the deed or counterpart, as, the owner of a rent-charge, he may plead it without profert."(a) Again, it is said: (b) "The general rule is, that a party *is not required to make profert of an instru- [*384 ment to the possession of which he is not entitled:" and, after citing *Dangerfield v. Thomas*, 9 Ad. & E. 292, 1 P. & D. 207, the learned editors proceed:—"The only exceptions to the general rule are, where the party pleading acts as servant to another, or where there is a privity of interest between them, as in the case of a release to a reversioner, of which the tenant for life may avail himself if he can get hold of it. So also, in the case of an heir or executor, who may plead a release to the ancestor or testator whom they respectively represent; as also in that of several tort-feasors; for, in all these cases, there is a privity between the parties which constitutes an identity of person. But there is no such privity, generally speaking, between a principal and surety; and therefore, where a defendant, a surety, by deed-poll guaranteed to the plaintiff the payment of a sum of money, it was held, that, in an action on the guarantee, the defendant might plead an indenture of release from the plaintiff to his principal, without making profert of

(a) Citing *Whitfield v. Fausset*, 1 V. 391.

(b) 1 Wms. Saund. 9 (a).

the indenture: *Bain v. Cooper*, 8 M. & W. 751. In the case just cited, PARKE, B., says: "The general rule on the subject of profert is that laid down in *Dangerfield v. Thomas*, viz. that a party is not required to make profert of an instrument to the possession of which he is not entitled. The only exceptions to that general rule are, where the party pleading acts as servant to another, or where there is a privity of interest between them, as in the case of a release to a reversioner, of which the tenant for life may avail himself, if he can get hold of it. So, also, in the case of an heir or executor, who may plead a release to the ancestor or testator whom they respectively represent; as also in that of several *385] tort-feasors; for, in all these *cases there is a privity between the parties, which constitutes an identity of person. But that is not so in the present case, where the parties are only in the relation of principal and surety, and there is no privity of contract between them, since the surety contracts with the creditor: they are not one person in law, and are not jointly liable to the plaintiff." So, in *Stephen on Pleading*, 5th edit. p. 484, 485, speaking of the necessity of profert, the learned author says,—“The rule extends only to cases where the party *claims* under the deed, or *justifies* under it; and, therefore, where the deed is mentioned only as inducement or introduction to some other matter, on which the claim or justification is founded, or alleged not to show right or title in the party pleading, but for some collateral purpose, no profert is necessary.(a) The rule is also confined to cases where the party relies on the *direct and extrinsic operation of the deed*.(b) Thus, in pleading a feoffment, no profert is necessary; for, the estate passes, not by the deed, but by livery. So, in pleading a conveyance by lease and release under the statute of uses, it is not necessary to make a profert of the lease, because it is the *statute* that gives effect to the bargain and sale for a year, and the deed does not ultimately establish the title. But, in pleading the release, profert ought to be made, as the same reason does not apply.(c) Again, a party is not bound to make profert of an instrument to the possession of which he is not entitled.(d) The reason assigned for the rule requiring profert, is, that the court may be enabled, *386] by inspection, to judge of the sufficiency of the *deed.”(e) The rule is similarly stated in *Chitty on Pleading*.(g) In the present case, the deeds in question not being any necessary part of the plaintiff's cause of action, or such as might ordinarily be presumed to be in their custody or power, they do not fall within the rule which requires profert to be made.

The plaintiffs are not interested in disputing the proposition, that a

(a) Citing *Bellamy's case*, 6 Co. Rep. 38 a; *Holland v. Shelley*, Hob. 303; *Bamfill v. Leigh*, 3 T. R. 571; *Com. Dig. Pleader* (O. 8), (O. 16); 1 *Wms. Saund.* 9 a, n. (1).

(b) Citing *Read v. Brookman*, 3 T. R. 156.

(c) Citing *Jenkin v. Peace*, *supra*, 375. *Sed vide note (b) ibid.*

(d) Citing *Dangerfield v. Thomas*, and *Bain v. Cooper*, *ubi supra*.

(e) Citing *Layfield's case*, 10 Co. Rep. 92 b.; *Co. Litt.* 356.

(g) Vol. I., 6th edit. p. 365, 7th edit. p. 378.

power in a settlement, to appoint in favour of the children of the marriage, does not authorize an appointment in favour of *grandchildren*, though that rule is, according to Sir Edward Sugden,^(a) subject to this qualification, viz., that "in *equity*, a valid appointment may be made to persons not objects of the power, with the approbation of the real object of the power. Therefore, if, upon the marriage of a child, the parent, by the marriage settlement, under a power to appoint to children, appoint to the issue of the marriage, the appointment would be supported in equity, not as a good appointment to the issue of the marriage, but as an appointment to the child *himself*, and a settlement of it by *him*;^(b) nor is it essential that such a settlement should be made upon marriage. The principle is, that the act operates, first, as an appointment, and, secondly, as a settlement by the appointee. Therefore, an appointment of personalty to the children of a married daughter, who is herself the object of the power, is valid, if made with the concurrence of the husband,^(c) for a husband can dispose of such of his wife in expectancy against every one but the wife surviving. And a settlement on a child and her husband, *and their issue, in strict settlement, was supported in equity, as the child was an assenting party to the settlement, although the power was confined to children; and, so far from the power being referred to, the donee (who was the original settlor) recited that he was seised in fee, and conveyed as owner, and there was no evidence that the child was aware of the existence of the power. This is the case of *Wade v. Paget*, 1 Bro. C. C. 364, and, strong as the circumstances are, the decision, in the absence of fraud, appears to be right." So, here, there was an assent by the child and her husband, though not, it is true, a contemporaneous or subsequent assent. It is by no means uncommon to settle future property in this way. The power, therefore, was well executed, at least, as to part, and for a period that is still subsisting. *Robinson v. Macdonnell* and *Lunn v. Thornton* have no application. This amounts to an equitable assignment, which a court of equity would give effect to: *Carvalho v. Burn*, 4 B. & Ad. 382, 1 N. & M. 700; *Burn v. Carvalho*, 1 Ad. & E. 883, 4 N. & M. 889; *Burn v. Carvalho* in equity, 3 Jurist, 1141. The 7 & 8 Vict. c. 76, s. 5, and 8 & 9 Vict. c. 106, s. 3, were intended to operate only on *legal* rights. [387

Although it is true, as a general principle, that written instruments must be stated according to their legal effect, it is nevertheless competent to a party to set it out *in hæc verba*. In *Moore v. The Earl of Plymouth*, 3 B. & Ald. 66, ABBOTT, C. J., said: "If the defendant had wished the court to construe the deed for him, he should have set it out *in hæc verba*, or at least so much as he meant to rely on." BAYLEY, J.,

(a) 2 Sugden on Powers, p. 281.

(b) Citing *Routledge v. Dorril*, 2 Ves. jun. 357; *Langston v. Blackmore*, Ambl. 289; *West v. Berney*, 1 Russ. & M. 431.

(c) Citing *White v. St. Barbe*, 1 Ves. & Bea. 390.

said: "We can form no judgment what operation it might have, unless we saw the very words of the deed." And HOLROYD, J., said: "In *388] deducing title, I have understood it to be an established rule, that conveyances are to be pleaded as they operate. It is so considered by Lord C. B. COMYNS, in his Digest, title *Pleader* (C. 37). That rule, however, does not apply to an action on a deed of covenant; in such an action it is stated, that, by a certain deed, it was witnessed that the party covenanted; the title in that case is not deduced." So, in *Ross v. Parker*, 1 B. & C. 358, 2 D. & R. 662, it was held, that, where a declaration states, that, by a certain indenture, "it is witnessed," &c., and sets out the very words of the deed, there is no variance, although the legal effect of the whole deed may be different from that which the part set out imports. "The declaration," said the court, "does not affect to state the legal effect of the deed; it merely states, that, by a certain indenture, 'it is witnessed,' &c., and then sets out a covenant, and a breach of it, for which the action is brought. If it had been stated as a fact, that the parties assigned money, and the deed showed that they assigned stock, there might, on a plea of *non est factum*, have been some ground for the objection." If, therefore, this deed has any operation to show any duty on the defendant, or any damnification to the plaintiffs, the latter are entitled to recover. This view of the case is not affected by *Price v. Williams*, 1 M. & W. 14.

It is said that no damnification was shown. If, however, the loan was improperly made, Stephens, the new trustee, though no party to that loan, was bound to call it in. Accordingly, he filed his bill, praying that the trusts of the settlement of the 4th of March, 1840, might be carried into effect. [CRESSWELL, J. You say, that, as there was a breach of trust, the plaintiffs were bound to obey the order of the Master of the *389] Rolls, and *are entitled to an indemnity.] The plaintiffs allege that the course taken by them was a reasonable course to take; and that they could have no defence to the suit.

Petersdorff, in reply. The plaintiffs in their declaration having affected to describe this as an absolute conveyance of the legal interest, the defendant is entitled so to view it. The assignment should have set out the assignment according to its legal effect. In *Robertson v. Showler*, 13 M. & W. 609, it was held that a party cannot, in deducing title in pleading, set out a deed or will at length, with averments as to the meaning of its words: he must state it according to its legal effect. [MAULE, J. Does that exclude the other alternative, of setting it out *in hæc verba*?] It is submitted that it does. The plaintiffs were clearly bound to make profert of the indentures of the 3d of January, 1809, and 4th of March, 1840. [MAULE, J. Suppose A. gives bonds to creditors of B., to secure their debts, and B. gives A. a deed of indemnity. A. being compelled to pay the debts, would he be bound, in an action upon the deed of indemnity, to make profert of the bonds?] No.

[MAULE, J. He would be bound to state them in his declaration. Having been compelled to pay the bonds, he would, of course, have them in his possession,^(a) and yet he would not be bound to make profert of them. That shows that there may be deeds which it is necessary to state in pleading, and which must be in the possession of the party pleading, and yet of which profert is not necessary.] That is not so as to deeds which give the party title to sue. [MAULE, J. The title to sue here, is the deed of indemnity.] The will of Mrs. Werninck could have no operation otherwise than as an execution of her power.

*COLTMAN, J., now delivered the judgment of the court.

This was an action brought for the breach of a covenant in an indenture dated the 12th of November, 1842. The declaration sets forth an indenture dated the 3d of January, 1809, being a settlement made upon the marriage of the Rev. John Werninck with Lena, otherwise Magdalena, Wynn, by which last-mentioned indenture it is provided that a policy of assurance should be obtained, for 5000*l.*, from the Equitable Assurance Office, upon the life of the said Magdalena Wynn, afterwards Werninck, and that the proceeds of such policy should be received and held by the trustees therein named, subject to the appointment of the said John Werninck and his intended wife, the said Magdalena Wynn, during their lives, or to the appointment of the survivor, in favour of an only child, or for all and every, or for any one or more, exclusive of the rest, of the children of the said intended marriage, if there should be more than one. The declaration also sets forth a certain other indenture, dated the 4th of March, 1840, being a settlement upon the marriage of Maria Lena Werninck, a daughter of the said John Werninck and Magdalena Werninck, with the defendant, and which last-mentioned indenture recited that the proposed marriage of John Werninck and Magdalena Wynn had been solemnized, and that John Werninck had died, leaving his wife surviving, without having joined in any appointment under the settlement and that there were four children of the marriage, of which the defendant's wife was one, and by such last-mentioned indenture the said Maria Lena, with the consent of her said intended husband, assigned all her right and interest in and to any fortune which she might become entitled to under the will of her mother Magdalena Werninck, to certain trustees therein named, upon trust for the separate use of the said Maria *Lena Werninck during her life, and upon further trust (as therein mentioned) for the children of the intended marriage, as the defendant and his wife should appoint, and, in default of appointment, upon trust for the children of the marriage, as therein mentioned. The declaration then set forth, according to its tenor, the indenture upon which the action is brought, and of which profert is duly made. This indenture was dated the 12th of November, 1842, and was made between the defendant of the first part, Maria Lena Schröder, the

(a) As deeds or as ex-deeds.

defendant's wife, of the second part, and the plaintiffs of the third part: and it recited the death of the said Magdalena Werninck, and that she had duly made and published her last will and testament, dated the 10th of July, 1840, and by which she directed and appointed that the sum of 2000*l.* should be settled upon the trusts declared in the indenture of settlement of the 4th of March, 1840, so far as the rules of law and equity would permit and the testatrix had power so to direct and appoint; but that, if the said testatrix had not such power, then she willed, directed, and appointed that the said sum of 2000*l.* should be paid to the defendant's wife, or as the said defendant's wife should by writing direct and appoint, to and for her own sole and separate use and benefit: and the indenture recited certain other indentures, by which the plaintiffs became and were trustees under the said indenture of the 4th of March, 1840, and that they had received the said sum of 2000*l.* which was property of a personal nature, to which the said wife of the defendant was beneficially entitled under the will of her said mother, and that the same was in the hands of the plaintiffs, subject to, and charged in equity with, the trusts expressed in the indenture of the 4th of March, 1840, and that the defendant was desirous to obtain from the plaintiffs a loan of the *392] said sum of 2000*l.*, and that it was considered that the said *Magdalena Werninck, the mother, had not power to appoint the said sum of 2000*l.* to be settled upon the trusts of the indenture of the 4th of March, 1840, and therefore, that, under the alternative appointment made by her, the said Maria Lena Schröder had become entitled thereto absolutely for her separate use, but that a question had been raised, whether the same was not subject to the assignment made by the indenture of the 4th of March, 1840; Wherefore, the said Maria Lena Schröder, with the approbation of the defendant, her husband, had proposed and consented that the said sum of 2000*l.* should be paid to the plaintiffs as trustees, to be held by them upon the trust therein declared, they having the indemnities from the defendant and the said Maria Lena Schröder his wife, respectively thereafter contained: And by the said indenture, the said Maria Lena Schröder ordered and directed that the said plaintiffs should stand possessed of the said sum of 2000*l.*, upon trust, upon the request of the defendant during the life of his said wife,—but not without her request, testified as therein mentioned,—lend and advance the said sum of 200*l.* to the said defendant, upon the securities therein mentioned: and the defendant covenanted with the plaintiffs to indemnify them in manner set forth in the declaration; and by another indenture dated also on the 12th of November, 1842, and made between the defendant and his wife and the plaintiffs, it was recited that the plaintiffs, at the request of the said Maria Lena Schröder, and of the defendant, had lent and advanced the said sum of 2000*l.* to the defendant; and it is averred in the declaration that the said sum of 2000*l.* had not been paid to the plaintiffs, and that the plaintiffs, by reason of the loan

thereof, were liable, in equity, to be sued by any future trustees of the said trusts in the indenture of March, 1840, and to be compelled to pay the same; and that, after the *making of the said indenture, and of the loan to the defendant, by a certain indenture therein mentioned, dated the 24th of September, 1845, Thomas James Werninck, Thomas Stephens and Henry Hope Werninck were appointed to be trustees of the trusts of the indenture of the 4th of March, 1840, in the place of the plaintiffs, and the plaintiffs had assigned to them all their interest in the property whereof they were such trustees, and that, before this suit, the said Thomas Stephens then, as such trustee, commenced a suit in the court of Chancery against the plaintiffs and the said defendant and his wife, and Ludolph Adrian Schröder and Wilhelmina Susan Schröder, children of the said marriage, and certain other persons were made defendants, and that the said Thomas Stephens afterwards presented a petition to the Master of the Rolls, praying that the plaintiffs might be ordered to transfer to the accountant-general of the said court of Chancery so much three per cent. consolidated bank annuities as might have been purchased with the sum of 2000*l.* on the 12th of November, 1842; and the declaration further alleged, that notice was given to the defendant of such petition, and that the plaintiffs were advised they had no defence to the said suit, and that, unless the defendant would take upon himself the defence of the said suit, they should consent to such order being made upon the said petition, as the said court might think proper, and would call upon the defendant to reimburse to them all sums of money, costs, charges, and expenses that they might pay or be put to in consequence of the said claim and the said suit: And the declaration alleged, that the defendant had declined to take such defence upon him, and that the plaintiffs afterwards, upon the hearing of the said petition, consented to such order being made as the said court should think proper; and that it was thereupon ordered that the plaintiffs *should transfer to the account of the accountant-general, in trust in the cause, as much three per cent. consolidated bank annuities as might have been purchased with the said sum of 2000*l.* on the 12th of November, 1842; and that the plaintiffs should pay the costs of the petition; whereupon and whereby the plaintiffs became liable to transfer to the accountant-general the stock therein mentioned, and were put to the expense thereby of 2500*l.*, and became liable to pay Stephens for costs 600*l.*, and were put, for their own costs, to the expense of 500*l.*; and by means and in consequence thereof, the defendant had broken his said covenant, and had not indemnified the plaintiff. [393]

To this declaration the defendant demurred, and assigned several causes of demurrer, some of which have been argued before us.

The first objection relied upon, was that no profit was made in the declaration of the two indentures therein set forth,—the one being the settlement upon the marriage of John Werninck and Magdalena Wynn, [394]

and the other an indenture by which the plaintiffs were appointed trustees under the settlement made upon the marriage of the defendant and his wife, dated the 4th of March, 1840.

The second objection made on the part of the defendant, was, that the declaration does not disclose any valid cause of action against the defendant; as the plaintiffs did not commit any breach of the trusts of the indenture of the 4th of March, 1840, by lending the sum of 2000*l.* to the defendant, because that sum never became subject to the trusts of that deed; but that the defendant's wife became entitled to it absolutely, under the will of her mother, Magdalena Werninck; and that the plaintiffs were, therefore, well justified in lending the same to the defendant, *395] at her request. And, in support of this objection, it was argued that the power created in favour of Mrs. Werninck by the indenture of settlement of the 3d of January, 1809, only authorized her to appoint in favour of the children of her marriage, and that her will was inoperative and void so far as it directed the fund of which the 2000*l.* was part should be subject to the trusts of the settlement of the 4th of March, 1840, in favour of her grandchildren,—such direction not being within the power conferred; and that therefore the defendant's wife became absolutely entitled to the said sum of 2000*l.*, under the power of appointment contained in the indenture of the 3d of January, 1809, and under the execution of that power, by that part of Mrs. Werninck's will, which provided, that, if it should be held that she had no power so to appoint, the said sum of 2000*l.* should be settled upon the trusts of the indenture of the 4th of March, 1840, she then directed and appointed the said sum to the defendant's wife, or as she should appoint.

It was further contended that the said indenture of the 4th of March, 1840, was inoperative as an assignment to the trustees named therein, of the said sum of 2000*l.*, inasmuch as an assignment of future expected property, to be derived under the will of a living person, is illegal and void, and inoperative *pro tanto*.

It was further insisted, that the indenture of the 4th of March, 1840, was improperly set out as an assignment, for the reason before mentioned, and contrary to its legal effect.

And it was further objected, that the loss which the plaintiffs alleged they had sustained by their obedience to the order of the Master of the Rolls set forth, was a loss occasioned by their own voluntary act, in having consented to the order, which order could not have been made adversely to them; and, therefore, that the damage occasioned by their *396] own voluntary act could give no claim for indemnity under the covenant declared upon: and it was argued that no breach of the trusts of the indenture of the 4th of March, 1840, had been committed by the plaintiffs, by the loan of the 2000*l.* to the defendant.

Upon the part of the plaintiffs, it was contended, in answer to the first objection, that profert of the indentures of the 3d of January, 1809, and

4th of March, 1840, was unnecessary, inasmuch as those deeds were set out in the declaration merely as inducement, and formed no ingredient in the plaintiffs' cause of action,—which was solely founded upon the indenture of the 12th of November, 1842. And we are of opinion that the answer so given was a valid and sufficient answer to the objection urged in that respect. The plaintiffs' interests were acquired entirely by the deed of the 12th of November, 1842, by force of which the plaintiffs acquired and received the 2000*l.*, and which by the same indenture they agreed to advance and lend to the defendant upon the covenant of indemnity therein contained. That indenture, therefore, coupled with the indenture of the same date, showing the money to have been lent pursuant to the agreement, together with the loss and damage which the subsequent allegations in the declaration show that they have sustained by reason of the said loan, forms the entire cause of action disclosed by the declaration. The indenture of the 12th of November, 1842, recites the indenture of the 4th of March, 1840, and that the plaintiffs held the sum of 2000*l.* upon the trusts of that deed, and that such sum had been agreed to be lent to the defendant upon the covenant of indemnity. And the declaration then avers that the said sum of 2000*l.* was in fact lent upon the security of that indenture and of a certain indenture of even date, of which profert is also duly made; and it is then averred that the said sum of 2000*l.* had never been *paid to the plaintiffs, [*397 and that the plaintiffs, by reason of the loan, became liable in equity to be compelled to pay and invest the said sum of 2000*l.* as thereinafter mentioned. The declaration then states the removal of the present plaintiffs as trustees, and the appointment of new trustees, and that such new trustees had called upon the now plaintiffs to pay the sum of 2000*l.*, or transfer such an amount of stock as such sum would have purchased on the 12th of November, to be held upon the trusts of the said deed of the 4th of March, 1840.

The rule prescribing the necessity of profert being made, is fully expounded in the cases referred to in the notes to *Jevens v. Harridge*, 1 Wms. Saund. 9 *b*, n. (*d*); and that such rule does not render it necessary to make profert of instruments set out by way of inducement only, is so well understood, that it is not necessary to refer particularly to the authorities: and this case clearly does not fall within any of the exceptions to that rule. The objection for want of profert, therefore, must be overruled.

As to the second exception,—that the indenture of the 4th of March, 1840, did not operate as an assignment, and is therefore improperly set out, and that it ought to have been set out according to its legal effect,—it has been answered, and correctly, that, in pleading (except in deducing title), a deed may be set out, either in its terms, leaving the court to construe it according to the legal effect of those terms, or the party may take the responsibility of stating it according to the legal

effect which it is contended to have: Com. Dig. *Pleader*, c. 37; Price v. Williams, 1 M. & W. 6, Tyrwh. & Gra. 197; 2 Wms. Saund. 97 b, n. (2). In the present declaration, the indenture objected to, is set out in *398] its terms, leaving it to the court to ascribe its *proper effect to it: and the objection, therefore, as to its being improperly set out, fails. And, with regard to the legal effect of that indenture, in reference to the present action, it is not necessary that it should be valid as an assignment: it is enough, if, in equity, it bound the fund in the hands of the trustees, subject to the trusts therein declared; and the declaration shows that it has been determined in equity to have that effect; and the object of the covenant upon which the action is brought, was precisely directed to indemnify the trustees against the consequences of such a construction by a court of equity,—where the question, in regard to the execution of the trust, would come in judgment: and that decision lays a sufficient foundation for the present action.

The remaining objection which has been argued before us, is, that by reason of the consent to the order of the Master of the Rolls, made in the suit brought against the plaintiffs, the loss, of which the plaintiffs complain, is the result and consequence of their own acts and procurements, and in respect of which, therefore, they can have no claim against the defendant for indemnity under his covenant set forth in the declaration. It appears to us that this objection cannot be sustained. The declaration states the suit commenced against the plaintiffs adversely, by the new trustees, who had been appointed in the plaintiffs' stead, calling upon the plaintiffs to pay the 2000*l.*, or transfer an amount of stock equal to what that sum would have purchased on the 12th of November, 1842, and that there was no defence to the suit so instituted, and that notice was given to the defendant, calling upon him to undertake the defence of the suit; which he did not do; and the consent of the plaintiffs, as alleged in the declaration, was not a consent to the order which *399] was made, but merely a consent, that, in a certain stage of *the cause, the court should decide whether the loan to the defendant was a breach of the trusts under which the plaintiffs held the fund, and should decide what order the plaintiffs were subject to in equity in that respect. The allegations in the declaration are admitted by the demurrer: the whole substance of the objection, therefore, is, that the plaintiffs have, for the purpose of saving expense, consented to a decision being made in an intermediate stage of the cause, instead of its being made at the hearing,—it not being shown that the decision could be in any degree affected by the stage of the cause in which it was pronounced, or that the plaintiffs, by incurring the expense of prosecuting the suit to the hearing, could have made any effectual defence, or have diminished the damage consequent upon an adverse decision. It does not appear that the decision so pronounced was less binding upon the plaintiffs, or that it was more prejudicial to the defendant, than it would have been if it

had been made at the hearing of the cause, according to the ordinary course of equity proceedings. Under these circumstances, we think that the plaintiffs' right of action upon the covenant for indemnity, is not prejudiced by such consent.

The objections, therefore, which have been urged upon this demurrer, cannot be supported; and there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

*CAUNT v. THOMPSON. Feb. 14.

[*400

Knowledge of the probability, however strong, that a bill of exchange will be dishonoured, cannot operate as a notice of dishonour, or dispense with it. But knowledge that the bill has been dishonoured, where the drawer is himself the party who is to pay the bill (as executor of the acceptor), does amount to notice.

In assumpsit by an endorsee against the drawer of a bill of exchange, the declaration, in the usual form, alleged that the bill was duly presented to the acceptor, that it was dishonoured, and that the defendant had notice thereof. The defendant pleaded,—that the bill was not presented to the acceptor,—and that the defendant had no notice of its dishonour.

At the trial, it was proved that the bill was presented, on the day it became due, at the house of the acceptor; and that the defendant, to whom it was there shown, said that the acceptor was dead, and that he was his executor,—adding a request that it might be allowed to stand over for a few days, and he would see it paid.

The judge permitted the declaration to be amended, by alleging the death of the acceptor, the appointment of the defendant as his executor, the proving of the will, and the presentment of the bill to the defendant for payment:—

Held, that the amendment was warranted by the statute 3 & 4 W. 4, c. 42, s. 23.

Held also, that there was sufficient evidence of notice of dishonour to the defendant.

THIS was an action of assumpsit by the endorsee against the drawer of a bill of exchange.

The declaration alleged that the bill was drawn by the defendant on John Whitley, payable to the order of the drawer two months after date; that the bill was accepted by Whitley, and endorsed by the drawer to one Tomlin, and by Tomlin to the plaintiff; that the bill, when due, was presented to Whitley, and dishonoured; and that the defendant had notice thereof, &c.

The defendant pleaded—first, that the bill was not duly presented to Whitley,—secondly, that the defendant had no notice of the dishonour of the bill. Issue thereon.

The cause was tried before WILDE, C. J., at the sittings in Middlesex after Michaelmas term, 1847. It appeared, that Whitley, the acceptor, died before the bill had arrived at maturity, having appointed the defendant, *the drawer of the bill, his executor; that the defend-
ant duly proved the will; that, when the bill became due, Tomlin, [*401
the endorsee, went to Whitley's house to present it; that he there saw the defendant, to whom he showed the bill, saying—"I have brought a bill from Caunt's: you know what it is;" and that the defendant thereupon said—"I am executor of Whitley; you must persuade Caunt to

let the bill stand over a few days, because Whitley has only been dead a few days: I shall see the bill paid."

On the part of the defendant, it was submitted that this evidence did not sustain the declaration. The plaintiff thereupon prayed leave to amend the declaration, by averring the death of Whitley, the appointment of the defendant as his executor, the proving of the will, and the presentment of the bill to the defendant. This being allowed, it was further objected, that there was no new proof of notice of dishonour to the defendant: and the lord chief justice intimating an opinion that what passed between Tomlin and the defendant did not amount to proof of notice of the dishonour of the bill, a verdict was taken for the plaintiff on the first issue, and for the defendant on the second,—leave being reserved to the plaintiff to move to enter a verdict on the second issue in his favour, or for judgment *non obstante veredicto* thereon,—and leave being also reserved to the defendant to move for a nonsuit, on the ground that the amendment made was not warranted by the 3 & 4 W. c. 42, s. 23.

Lush, in Hilary term last, on the part of the plaintiff, obtained a rule nisi to enter a verdict for him on the second issue, or for judgment *non obstante veredicto* thereon. He submitted, that, under the peculiar circumstances of this case, the drawer was not entitled to notice of the dishonour of the bill; and that, if he ^{*402]} was so entitled, the facts proved amounted to notice. He referred to *Bickerdike v. Bollman*, 1 T. R. 405, *Fitzgerald v. Williams*, 8 Scott, 271; *Kemble v. Mills*, 1 M. & G. 757, 2 Scott, N. R. 121; *Sharp v. Bailey*, 9 B. & C. 44, 4 M. & R. 4; *Burgh v. Legge*, 5 M. & W. 418, and *Miers v. Brown*, 11 M. & W. 372.

Byles, Serjt., also obtained a rule nisi to enter a verdict for the defendant on the first issue, on the ground that the amendment was not warranted by the statute.

Dowdeswell and *Crouch*, for the defendant. The amendment was improperly allowed; and, if well made, the second was a material issue, and the verdict upon it was properly entered for the defendant.

The amendment introduced the fact of the death of Whitley, that the defendant was appointed his executor, and that he duly proved the will.^(a) This was introducing an entirely new case, which the defendant had no opportunity of meeting; for, if the defendant was executor of Whitley, a presentment to *him* would be sufficient, and would probably dispense with notice to him as drawer. The statute 3 & 4 W. 4, c. 42, s. 23, never intended to authorize amendments which would introduce new matter, which the defendant might have traversed. One of the most recent cases upon the subject, is *Boucher v. Murray*, 6 Q. B. 362. There, the declaration—on a guarantee—stated, that, in consideration that the plaintiff would

(a) *Quære* the necessity of averring that the will was proved—of stating the evidence of the defendant's executorship.

make advances of money by way of loan to B., the defendant promised to repay *the plaintiff* such sums as he should so *advance*, if B. should make default; assigning for breach, that B. made default, *and that the defendant did not pay *the plaintiff*. The defendant pleaded [*403 that the plaintiff did not *make* the said advances to B. in manner and form, &c., whereupon issue was joined. At the trial, the judge ordered the declaration and plea to be amended, under the statute 3 & 4 W. 4, c. 42, s. 23, by stating in the count, that, in consideration that the plaintiff would *procure the British and Australian Bank, in which the plaintiff was a partner, to make advances, &c., to B., the defendant promised the plaintiff to repay the said Bank, such sums as the plaintiff should so cause to be advanced, &c.; and, in the plea,—that the plaintiff did not procure the said Bank to make the said advances: and it was held that such amendment was not warranted by the statute. Lord DENMAN says: “The introduction of a new fact carries the case beyond any of those in which amendments have been allowed.” And WIGHTMAN, J., says: “The amendment introduces a new term into the agreement, ‘cause to be advanced by the Australian Bank;’ and, as the declaration stands when amended, it is not supported by the evidence.” So here, new facts are introduced; and that with a view to get rid of the plea of want of notice: the defendant, therefore, was materially prejudiced in his defence. [CRESSWELL, J. How can it be material to the merits, as far as the drawer is concerned, whether the bill was presented to the acceptor or to his executor? The statute contemplates that the amendment may embarrass the defendant; and, in that case the judge may postpone the trial. The judge cannot know that the defendant will be prejudiced in his defence, unless the defendant tells him so.] The amendment introduces a totally different state of facts: the prejudice to the defendant is patent.*

Then, does the circumstance of the acceptor dying, and the bill being presented to the drawer as his executor, dispense with notice of dishonour? It may be *that the presentment to the defendant at the place where the bill was made payable, was a sufficient presentment: *Buxton v. Jones*, 1 M. & G. 83, 1 Scott, N. R. 19. But “notice” is a technical word, and is only to be satisfied by the constituents of a legal notice. In *Burgh v. Legge*, 5 M. & W. 418, in assumpsit on two bills of exchange, by endorsee against his immediate endorser, averring notice of dishonour, the defendant, by his plea, traversed the notice of dishonour as alleged: the plaintiff, in order to support that issue, proved, that, on the day when the first bill became due, the defendant called upon him, and told him that he knew neither of the bills would be paid, that it was no use sending him a twopenny post letter the next day to give him notice, as it was not worth the money, and that he would send the plaintiff money, in part payment of the bills, on a future day: and it was held that this was not evidence of notice of dishonour, but of a

dispensation with it, and that it ought to have been so alleged in the declaration. In the course of the argument of that case, reference being made to a *dictum* of HOLROYD, J., in *Cory v. Scott*, 3 B. & Ald. 625, where he says—"I think, that, where a person draws on his own account, and at the same time knows that the bill, when presented, will be dishonoured, the general allegation of notice, as in the declaration, would be sufficient." PARKE, B., observes,—“But BAYLEY, J., there says, ‘If notice be averred to have been given, it seems to me it ought to be proved; and the proof of circumstances which excuse the giving of notice does not seem to be *ad idem* with such an averment.’” And the counsel continuing—“But, the learned judge adds, ‘Possibly, however, it might be considered that such circumstances would be evidence of notice, inasmuch as *they would be evidence that the party knew the bill would be dishonoured.’”—PARKE, B., said: “The case of *Solarte v. Palmer*, 1 N. C. 194, 1 Scott, 1, and numerous others, appear to show that the law intends an actual *notification*, and that the bare fact of *knowledge* is not sufficient.” And afterwards, in giving judgment, the learned baron says: “There must be proof of a notice given from some party entitled to call for payment of the bill, and conveying, in its terms, intelligence of the presentment, dishonour, and parties to be held liable in consequence. That is the true meaning of the word ‘notice,’ when used in declarations of this kind; and the mere knowledge of the party is not enough.” If that be the true rule, it is quite clear that what passed between the defendant and the party who presented the bill in the present case, did not amount to a notice of dishonour within the meaning of the second issue. No intimation was conveyed to the defendant, that he would be called upon, as drawer, to pay the bill. If he had been so called upon, he might have paid the bill, and retained enough out of the first assets of the testator that came to his hands, to reimburse himself. [MAULE, J. In *Sharpe v. Bayley*, 9 B. & C. 44, 4 M. & R. 4, where the drawer of a bill made it payable at his own house, it was held that notice of the non-payment to him was unnecessary.] That was on the ground that it might, under the circumstances, be fairly inferred that it was an accommodation bill.

Lush, contra. [COLTMAN, J. We are all agreed as to the propriety of the amendment.] The issue is, that the defendant had notice, on the day on which the bill became due, that it was not paid. The evidence was that the bill was duly presented at the house of the acceptor; that *406] the drawer was there; and that he *requested that the bill might be held over for a few days, saying that the acceptor was dead, and that he, the drawer, was appointed his executor. The defendant, therefore, clearly had notice of the presentment and non-payment of the bill. It was in fact presented to himself, he being the person whose duty it was to pay it. It may be conceded that evidence of previous knowledge on the drawer’s part, that the bill will not be paid by the

acceptor, will not sustain an averment of notice: that was decided in *Burgh v. Legge*. To constitute a valid notice, all that is necessary, is, to show that the holder of the bill notifies to the drawer, that the bill was duly presented, that it is unpaid, and that he (the drawer) is held liable for it. In *Miers v. Brown*, 11 M. & W. 372, ALDERSON, B., said—"Knowledge of the dishonour, obtained from a communication by the holder of the bill, amounts to notice." [MAULE, J. There, something was said and done by the holder to the drawer. Here, the holder of the bill shows it to the acceptor's executor, who happens to be the drawer. When he asks him to pay the bill, that is not giving him notice of dishonour: neither is the other's request that it may be held over for a short time. What, then, is there to constitute a notice?] The whole circumstances. [MAULE, J. Then, your argument amounts to this,—that there may be a valid notice of dishonour, although the holder does nothing and says nothing.] The law does not require the performance of mere idle ceremonies. [MAULE, J. When you allege an idle ceremonial, and a traverse is taken upon it, can you ask for a verdict upon it, on the mere ground that it is idle?] The whole transaction having taken place with the drawer himself, what necessity can there be for telling him that he has refused payment of the bill? The language of the *declaration must be understood with reference to the circumstances. Suppose the drawer of a bill to have married the acceptor- [*407 or in the interval between the acceptance of the bill and its arrival at maturity, would the drawer in that case be entitled to a formal notice of dishonour? [V. WILLIAMS, J. Suppose the holder of a bill employs the drawer to present it? CRESSWELL, J. And suppose the drawer writes to the holder, and tells him that the bill has been dishonoured,—would that amount to notice?] It is submitted that it would, within the principle of *Miers v. Brown*. [V. WILLIAMS, J. In *East v. Smith*, 16 Law Journ. N. S., Q. B. 292, COLERIDGE, J., says: "It seems to be universally held in the mercantile world, now-a-days, that there should be notice, express, or by implication (and by that, I mean such implication as Mr. Baron PARKE alluded to in the case of *Lewis v. Gompertz*, 6 M. & W. 402), of three things, namely, presentment, non-payment, and that the party to whom the notice is given, will be looked to for payment."] The notice must be such as the party entitled to notice may confidently act upon.

Where the drawer has no right to expect that the acceptor will pay the bill,—as, where it is an accommodation bill, so that he could not be damnified by the want of notice,—a notice of dishonour is not necessary: *Sharp v. Bailey*, 9 B. & C. 44; *Fitzgerald v. Williams*, 8 Scott, 271. In the present case, whatever funds the acceptor had, were in the hands of the defendant as his executor. He could not have sustained any damage from the want of notice; and, at all events, if he had, he should have pleaded it. [MAULE, J. For the purpose of this part of the motion,

it must be taken that the defendant did not know that the bill had been presented, or that it was unpaid.] He knew that the acceptor was not *living. [MAULE, J. It may be, that, if the defendant had *408] received due notice of dishonour, he would have paid the bill, and would have repaid himself out of the testator's assets; and that he has since exhausted those assets, by paying debts of equal degree. And so he might be prejudiced.] If he chooses so to part with the assets, his damnification is the consequence of his own wilful act.

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court.

This was an action of assumpsit by the endorsee, against the drawer, of a bill of exchange.

The declaration alleged that the bill was drawn by the defendant on J. Whitley, payable to the order of the drawer two months after date, that the bill was accepted by Whitley, and endorsed by the drawer to Tomlin, and by Tomlin to the plaintiff, and that the bill, when due, was presented to Whitley, and dishonoured, of which the defendant had notice.

The defendant pleaded,—first, that the bill was not duly presented to Whitley,—secondly, that the defendant had no notice of the dishonour of the bill.

At the trial before WILDE, C. J., at the sittings in Middlesex after Michaelmas term, 1847, it appeared in evidence, that, before the bill became due, the acceptor died, having made the defendant (the drawer) his executor, and that he had proved the will; that, when the bill became due, the plaintiff sent one of the witnesses to the house of the acceptor, to present the bill; that the witness there saw the defendant, to whom he presented the bill, saying,—“I have brought a bill from Caunt's: you know what it is;” and that thereupon the defendant said,—“I am executor of Whitley: you must persuade Caunt to let the bill stand over *409] a few days, *because Whitley has only been dead a few days: I shall see the bill paid.”

Upon this evidence, the plaintiff applied for leave to amend his declaration, by averring the death of the acceptor, the appointment of the defendant as his executor, and the presentment of the bill to him.

The lord chief justice allowed the amendment to be made, and said that the proof of presentment to the executor was not sufficient proof of notice of dishonour.

A verdict was thereupon taken for the plaintiff on the first issue, and for the defendant on the second; leave being reserved to the plaintiff to move to enter a verdict on that issue in his favour, or for judgment *non obstante veredicto*; and leave being likewise reserved to the defendant to move on the ground that the amendment ought not to have been made.

Cross rules were accordingly obtained in Hilary term 1848.

At the argument, we disposed of the defendant's rule, thinking the

amendment properly allowed: and now, after consideration, we think that the plaintiff's rule, to enter a verdict in his favour on the second issue, must be made absolute.

It may be assumed to be a settled rule, that knowledge of the probability, however strong, that a bill of exchange will be dishonoured, cannot operate as a notice of dishonour, or dispense with it. Pothier, *Contrat de Change*, Part I. c. 5, § 147, (a) lays down the same rule with reference to foreign (b) bills, viz. that the notorious insolvency of the acceptor of a bill does not dispense with protest for non-payment, and notice to the prior parties, because the insolvency of the acceptor, however notorious, may not be known to them, or, in the absence of notice, they may suppose *that the acceptor, though insolvent, has found [*410 means to take up the bill. So also it may be considered as settled, that information that a bill has been dishonoured, derived from a person not having authority to give it, does not supply the place of notice. Hence it has become usual to say that *knowledge* of the dishonour of a bill is not equivalent to *notice*. In such cases as those above mentioned, it certainly is not.

The law has not been so well settled as to the nature of the notice to be given. In *Hartley v. Case*, 4 B. & C. 339, ABBOTT, C. J., said: "There is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange; but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor." Since that case was decided, there has been some fluctuation of opinion on the subject. In *Solarte v. Palmer*, 7 Bingh. 530, 5 M. & P. 475, 1 Tyrwh. 371, 1 C. & J. 417, which was finally decided in the House of Lords (1 N. C. 194, 1 Scott, 1, 8 Bligh. N. S. 874), a very strict rule was adopted; but that has not been adhered to. In *Burgh v. Legge*, 5 M. & W. 418, PARKE, B., says: "There must be proof of a notice given from some party entitled to call for payment of this bill, and conveying in its terms intelligence of the presentment, dishonour, and parties to be held liable in consequence." But, in *Furze v. Sharwood*, 2 Q. B. 388, and *King v. Bickley*, 2 Q. B. 419, it was decided that the notice need not, in terms, inform the party to whom it is given, that he is looked to for payment: and, in *Miers v. Brown*, 11 M. & W. 372, these latter decisions were followed.

The rule does not differ in substance from that given by ASHHURST, J., in *Tindal v. Brown*, 1 T. R. 167:—"Notice *means something [*411 more than *knowledge*; because it is competent to the holder to give credit to the maker. (c) It is not enough to say that the maker does not intend to pay, but that he, the holder, does not intend to give credit." In substance, these cases seem to establish, that, in order to

(a) Citing *Savary*, parer. 45.

(b) "Foreign" as opposed to "English," not as opposed to "inland"

(c) The action was on a promissory note.

make a prior holder responsible, he must derive, from some person entitled to call for payment, information that the bill has been dishonoured, and that the party is in a condition to sue him, from which he may infer that he will be held responsible. In *Miers v. Brown*, ALDERSON, B., describes what is needful, in these terms: "Knowledge of the dishonour obtained from a communication by the holder of the bill, amounts to notice."

In the present case, the defendant knew that the bill was dishonoured and he knew it from the best source, namely, his own personal act in dishonouring it when presented by the holder: and he knew, from the same source, that time had not been given to the acceptor. He had, therefore, all the information which, according to ASHHURST, J., the notice ought to convey: and, knowing that, he would know also that the holder had placed himself in a situation to call upon him (the drawer) for payment, from which,—to adopt the view of modern decisions,—he might infer that he would be called upon. This is very different from that knowledge which has been spoken of as not equivalent to notice, and is at least as much notice as the knowledge spoken of by ALDERSON, B., in *Miers v. Brown*. Indeed, there would be some absurdity in requiring that the plaintiff should have stated to the defendant at the time when he dishonoured the bill, "Take notice that this bill has been dishonoured by you." Lord ELLENBOROUGH seems to have been of that opinion in the *412] case of *Porthouse v. Parker*, 1 Camp. 82, an action by the payee against the drawer of a bill. It was drawn by one Wood as agent of George James and John Parker, upon John Parker. There was no proof that Wood had authority to draw: but evidence being given that the bill was accepted by a duly-authorized agent for John Parker, Lord ELLENBOROUGH held that it was evidence of the bill having been regularly drawn; and that, the acceptor being likewise a drawer, there would be no occasion for the plaintiff to prove that the defendants had received express notice of the dishonour of the bill, as this must necessarily have been known to one of them; and the knowledge of one was the knowledge of all.

Upon the authority of that case, and upon principle, we think that the notice to the defendant in this case was established, and that the verdict should be entered for the plaintiff on the issue on the second plea.

Plaintiff's rule absolute.

Defendant's rule discharged.

*413] *EDMONDS v. CHALLIS and Another. Feb. 14.

The jurisdiction of the old county courts in replevin, is, by the 119th section of the 9 & 10 Vict. c. 95, transferred to the new courts established under that act. The sheriff must, however, still take a bond pursuant to the statute 11 G. 2, c. 19.

But a bond conditioned for the obligor to appear "at the next county-court for the county of M.,

to be holden at the sheriff's office in, &c., and then and there to prosecute his suit with effect," &c., is bad.

In an action against the sheriff for taking an insufficient replevin-bond, the reasonable measure of damages, is, the amount of the rent and the expenses of the distress.

The declaration alleged that the (old) county-court had not jurisdiction at the time of taking the bond :—Held, on motion in arrest of judgment, that the declaration was sufficient, without alleging a want of jurisdiction at the time of the plaint to the sheriff.

At the trial of an action against the sheriff for taking insufficient pledges in replevin, notice having been given to the defendants to produce the bond, the plaintiff's counsel called for it; and, on the defendants' counsel declining to produce it, a copy obtained from the sheriff's office was put in, and was about to be read, when the defendants' counsel interposed, and offered the original, and then objected that it could not be read, without calling the subscribing witness. The judge overruled the objection :—Held, that he was right in so doing.

THIS was an action upon the case against the sheriff of Middlesex, for having taken a replevin-bond not in conformity with the statute 11 G 2, c. 19, s. 23.

The declaration stated that the plaintiff, after the 14th of March, 1847, to wit, on the 29th of March, 1847, and within the jurisdiction of the Whitechapel County-court of Middlesex, on certain premises situate in the county of Middlesex, and within the jurisdiction of the Whitechapel County-court of Middlesex, by one George Ellis, his bailiff in that behalf, lawfully took and distrained divers goods and chattels, to wit, &c., then being in and upon the said premises, and of great value, to wit, of the value of 47*l.* 4*s.*, as a distress for certain arrears of rent, to wit, for the sum of 35*l.* of lawful money, then due and owing from a certain person, to wit, one Henry Rowe, to the plaintiff for the rent of the said premises, with the appurtenances, by virtue of a certain demise thereof, &c.; that the *plaintiff, by the said George Ellis, his said bailiff, [*414 detained the said goods and chattels so taken and distrained, for the cause aforesaid, until the defendants, then being sheriff of the said county, afterwards, to wit, on, &c., and within their bailiwick as such sheriff, that is to say, on the complaint of one Kitty Gladman, made to the now defendants, so being then such sheriff as aforesaid, against the said George Ellis in that behalf, and under colour of their office as such sheriff as aforesaid, caused the said goods and chattels to be replevied and delivered to the said Kitty Gladman, and then made deliverance of the said distress to the said Kitty Gladman; that, although it was the duty of the now defendants, as such sheriff, before their making deliverance of the said distress to the said Kitty Gladman as aforesaid, in pursuance of the statute in such case made and provided, to take from the said Kitty Gladman, and two responsible persons as sureties, a bond in double the value of the goods and chattels so distrained as aforesaid, conditioned *for prosecuting the suit of replevin of the said Kitty Gladman* for the taking the said goods and chattels, *with effect, and for duly returning the same, in case a return should be awarded*, as the defendants then well knew; nevertheless, the now defendants, so being such sheriff, not regarding their duty, &c., did not nor would, before their making deliverance of the said distress to the said Kitty Gladman as

aforesaid, take from the said Kitty Gladman and two responsible sureties as aforesaid, such a bond as aforesaid, conditioned as aforesaid. or any bond, except the bond thereafter mentioned; but wrongfully and injuriously omitted so to do, and then, after the said 14th of March, 1847, to wit, on, &c., only took from the said Kitty Gladman, and A. B. and C. D., being two responsible persons, as sureties, a bond in double the value of the said goods and chattels so distrained as aforesaid, *415] conditioned for *the said Kitty Gladman's appearing at the then next county-court for the county of Middlesex, to be holden at the house known as the sheriff's office, in Red Lion Square, in the said county, and for the said Kitty Gladman's *then and there*, that is to say, in the said last-mentioned county-court of Middlesex, *prosecuting her, the said Kitty Gladman's action with effect against the said George Ellis for taking and unjustly detaining the said goods and chattels, and for the said Kitty Gladman's making return thereof, if return should be adjudged by law, and for the said Kitty Gladman's well and truly keeping harmless and indemnified the said sheriff, &c.,—*which said county-court mentioned in the said condition as aforesaid had not, *at the time of the taking of the said bond*, any jurisdiction to hear or determine any action of replevin for the taking and detaining the said goods and chattels, or any or either of them; that the Whitechapel county-court of Middlesex was, at the time of the taking of the said bond, the only court in which the said Kitty Gladman could validly commence an action of replevin for taking and detaining the said goods and chattels; and that, by means of the said premises, the plaintiff was wholly deprived of the said goods, and of the benefit of the said distress, and of the means of satisfying the said arrears of rent, and the costs and charges of the said distress, amounting to a large sum, to wit, 10*l.*, and at the time of the commencement of this suit, was likely to lose the said arrears and costs and charges, in consequence of the premises, although a reasonable time for the said Kitty Gladman's commencing, in the Whitechapel County-court of Middlesex an action of replevin for the taking and detaining the said goods and chattels elapsed after the replevying of the same as aforesaid, and before the commencement of this suit, and although the said Kitty *416] Gladman did not, within such reasonable *time, commence, in the last-mentioned court, such action as aforesaid; but the plaintiff lost the benefit of such bond as the defendants ought to have taken, and omitted to take as aforesaid, and was put to great charges in and about ascertaining what bond the defendants had taken, and about inquiring into the sufficiency of the said bond, and the power of the defendants to assign the same to the plaintiff, &c.

The defendants pleaded,—first, not guilty,—secondly, that the county-court mentioned in the said condition as aforesaid, had, *at the time of the taking of the said bond*, jurisdiction to hear and determine any action of replevin for the taking and detaining the said goods and chattels.

The cause was tried before CRESSWELL, J., at the sittings in Middlesex in Michaelmas term, 1847. The facts were as follows:—The plaintiff was the landlord of certain premises situate in Assembly Row, Mile-end Old Town, in the county of Middlesex. On the 29th of March, 1847, rent being in arrear to the amount of 35*l.*, the plaintiff distrained upon his tenant George Rowe, when the goods were claimed by one Kitty Gladman, Rowe's sister. Application having been made to the sheriff, in the usual way, for a replevin, he, on the 1st of April, took from Kitty Gladman and two sureties, a replevin-bond, conditioned for the appearance of Kitty Gladman at the next county-court, for the county of Middlesex, to be holden at the house known by the name of the sheriff's office, Red Lion Square, in the said county, and *then and there* prosecuting her suit with effect and without delay.

The bond being called for, and the defendants' counsel declining to produce it, the plaintiff's counsel called a witness, who produced a copy which he had obtained at the sheriff's office; and, upon the copy being about to be read, the defendants' counsel tendered the original, and then insisted that the attesting witness must be called [*417 before the bond could be read. The learned judge, however, over-ruled the objection.

It was insisted on the part of the plaintiff, that the bond was informal and void, and that it should have been conditioned to appear at the Whitechapel County-court of Middlesex, created by the 9 & 10 Vict. c. 95, within the district of which, the premises in question were situate,—that court having been established under the order in council of the 15th of March, 1847, and having begun the issuing of summonses on the 22d of the same month.

A verdict was found for the plaintiff, damages 37*l.* 16*s.*, being 35*l.* for the amount of the rent in arrear, and 2*l.* 16*s.* for the costs of the distress; and leave was reserved to the defendants to move to enter a verdict for them, if the court should be of opinion that the bond was sufficient.

Bramwell, on a subsequent day in the same term, accordingly moved for a rule nisi to enter a verdict for the defendants; and also for a new trial, on the ground of misdirection, and the improper reception of evidence. He referred to 2 Inst. 139, Co. Litt. 145 b, *Gilbert on Replevin*, p. 85, *Jackson v. Hanson*, 8 M. & W. 477, *Rearden v. Minter*, 5 M. & G. 204, 6 Scott, N. R. 237, and the statutes 11 G. 2, c. 19, s. 23, and 9 & 10 Vict. c. 95, ss. 4, 58, 119, 120, 121.

He further moved in arrest of judgment, on the ground that the declaration did not show that the jurisdiction of the sheriff to grant replevin, was taken away by the establishment of a properly-constituted county-court,—citing *The Queen v. The Guardians of the Dolgelly Union*, 8 Ad. & E. 561, 3 N. & P. 542, where it was held that the court *will [*418 not take judicial notice of the rules made by the poor-law commissioners, for the government of a union, under the statute 4 & 5 W.

4, c. 76, s. 15. [MAULE, J. The court must take judicial notice of the act of parliament, and must assume that it is possible that the jurisdiction of the sheriff may have been taken away: it is averred that the jurisdiction is taken away, and there is an issue thereon.] It is tantamount to an allegation, that, in that particular part of his bailiwick, the sheriff had no jurisdiction. [MAULE, J. There being an issue taken upon it as alleged, it was necessary to prove it.] Then, the declaration alleges that "the said county-court mentioned in the condition, had not, at the time of the taking of the said bond, any jurisdiction to hear or determine any action of replevin." That, it is submitted, is clearly insufficient; it should have been "at the time of the plaint made to him." It is the sheriff's duty to take the bond before he delivers the goods. If the new county-court was not established at the time of the plaint, the sheriff could not take the bond in any other form than he did. [MAULE, J. The bond is to enforce a future proceeding. If his jurisdiction is taken away, the sheriff has taken a bond for the doing of something which cannot be done.]

Further, the learned judge should have told the jury, that, in the absence of evidence of actual damage, they should find nominal damages only, to which alone the plaintiff could be entitled. In *Bales v. Wingfield*, 4 Q. B. 580 (a), it was held, that, in an action against the sheriff for negligence in executing a *fi. fa.*, the plaintiff cannot recover more than nominal damages, unless he prove actual damage: and TAUNTON, J., seems to have doubted whether even nominal damages could be recovered. [WILDE, C. J. Where the sheriff parts with the goods, that may be *419] **prima facie* evidence of damage to the value of the goods.

A rule nisi having been granted,

Baines and *Massey Dawson*, in Michaelmas term last, showed cause. At common law, the replevin was by writ out of Chancery. But, this remedy being found to be too tedious for the distant parts of the kingdom, a more expeditious remedy was provided by the statute of Marlebridge, 52 H. 3, c. 21, which enacted, "*Quod si averia cujus capiantur, et injuste detineantur, vicecomes, post querimoniam(a) inde sibi factam, ea, sine impedimento, vel contradictione ejus qui dicta averia ceperit, deliberare possit.*" "By force of this statute," says the Lord Chief Baron GILBERT, (b) "the sheriff may hold plea in replevin by plaint of any value, as he might, at common law, on a writ of replevin; the writ of replevin being a *justicies* or commission for that purpose. And to take away all the delays which attended the replevin by writ, the sheriff, by this act, may, upon complaint made, command his bailiff, either by word or precept, to replevy the plaintiff's beasts; for, possibly, the sheriff cannot write,—which was frequently the case in those days,—or has not the materials of writing with him; and this the sheriff may do out of his

(a) Upon complaint out of court, not *post querelam* in court.

(b) Gilb. Distr. 92.

county-court: for, this act, being made for the more speedy administration of justice, hath received the most favourable construction. It would be very inconvenient that the owner of the beasts, for whose benefit the act was made, should stay till the next county-court, which is held only from month to month. But then the sheriff must enter the plaint at the next court, that it may appear on the rolls of the court." The next statutory provision on the subject, is the 1 & 2 Ph. & M. c. 12, s. 3, which, "for the *more speedy delivery of cattle taken by way of distress," enacted "that every sheriff of shires, being no cities [*420 nor towns made shires, shall, at his first county-day, or within two months next after he hath received his patent of office of sheriffwick, depute, appoint, and proclaim in the shire-town within his bailiwick, four deputies at the least, dwelling not above twelve miles one distant from another; which said deputies so appointed and proclaimed shall have authority in the sheriff's name to make replevin and deliverance of such distresses, in such manner and form as the sheriff may and ought to do," &c. Then came the 11 G. 2, c. 19, s. 23, which, "to prevent vexatious replevins of distresses taken for rent," enacts, "that, from and after the 24th of June, 1738, all sheriffs and other officers having authority to grant replevins, may and shall, in every replevin of a distress for rent,—take, in their own names, from the plaintiff, and two responsible persons as sureties, a bond, in double the value of the goods distrained (such value to be ascertained by the oath of one or more credible witness or witnesses not interested in the goods or distress, which oath the person granting such replevin is hereby authorized and required to administer), and conditioned *for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded*,—before any deliverance be made of the distress; and that such sheriff or other officer as aforesaid taking any such bond, shall, at the request and costs of the avowant or person making consurance, assign such bond to the avowant or person aforesaid, by endorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses; which may be done without any stamp, provided the assignment so endorsed be duly stamped before any action brought thereupon; and, if the bond so taken and assigned be *forfeited, the avowant, or person making consurance, may bring [*421 an action, and recover thereupon in his own name," &c. The bond having been taken, and the goods restored, the next proceeding, under the old law, was, the institution of the replevin suit in the county-court of the sheriff. The 9 & 10 Vict. c. 95, has introduced a new course of proceeding. The 119th section enacts, "that all actions of replevin in cases of distress for rent in arrear or damage-feasant which shall be brought in the county-court, shall be brought without writ, in a court held under this act." Section 120 enacts, "that, in every such action of replevin, the plaint shall be entered in the court holden under

this act for the district wherein the distress was taken." After the passing of this act, therefore, the whole of the proceedings in the replevin suit, from the plaint downwards, are to be had in the new county-court. By the order in council pursuant to the act, the county of Middlesex is divided into eleven districts. The district court of Whitechapel, which was thereby constituted from and after the 15th of March, 1847, commenced issuing summonses on the 22d of the same month. The distress in question was made on the 29th, and the replevin-bond taken on the 1st of April following. Notwithstanding the passing of the 9 & 10 Vict. c. 95, it was still the sheriff's duty to take a bond under the 11 G. 2, c. 19; and, if, in so doing, the plain words of the act had been followed, there would have been no difficulty; the bond would have been as available under the new course of proceeding as under the old. Instead, however, of pursuing the words of the statute, the sheriff takes a bond conditioned for the appearance of the obligor "at the next county-court, to be holden at the house known by the name of the Sheriff's Office, Red Lion Square," and for her "then and there prosecuting her action with *422] effect,"—a form which is justly *censured by the court of Exchequer, in *Jackson v. Hanson*, 8 M. & W. 477, 3 M. & G. 206 n., where PARKE, B., in delivering the judgment of the court, says: "The difficulty in this case has arisen from the improper form in which the condition of the replevin-bond has been drawn, *viz.* to appear at the then next county-court, and *then and there* to prosecute his suit with effect. The form of the condition should have pursued the words of the act, 11 G. 2, and should have been, for the defendant John Hanson to appear at the then next county-court, and prosecute his suit with effect and without delay. Upon the condition of the bond in the form in which it is drawn, the question first arises, what is its meaning? If it be, that the defendant is to appear at the then next court, and *at that court* prosecute his suit to a not unsuccessful termination (which is the true import of the term 'with effect'), the breach is properly assigned. If, however, the true meaning of the condition is, that he shall appear at the next county-court, and then and there prosecute his suit, that is, begin to prosecute it, and afterwards prosecute it with effect, then the breach is improperly assigned; for, it is consistent with the averments in that breach, that the suit may have been begun at the first county-court, and, though not terminated at that court, *may still continue*; and then the condition has not been broken. And we think that such is the true meaning of the condition; for, if we do not so construe it, the consequence would be, that the bond would, under ordinary circumstances, certainly be forfeited on the day after the first county-court should be held, as it would be impossible for the defendant, according to the course of the county-court, to levy his plaint, issue a summons, and make it returnable, and proceed to trial or judgment in *one* *423] day, or at one court; and, though there is a bare *possibility* of the penalty *being saved by the death of either party before the first

court, or the abatement of the suit on the same day that the first court should be held after the plaint levied, we think that the condition is to be construed with reference to the ordinary course of a suit, and not with a view to such remote contingencies; the object of the bond being, that the question whether the goods were rightly taken, should be properly litigated in the ordinary way, but with reasonable speed. The condition, therefore, ought to be construed in the sense last attributed to it." *Morris v. Matthews*, 2 Q. B. 293, 1 Gale & D. 677, is to the same effect. [MAULE, J. You say that this bond is conditioned for the doing of something which is now impracticable?] Precisely so. It may be that it would be available at the suit of the sheriff, as a single bond; but it clearly is not assignable: and, though the sheriff might have a security under the indemnity clause, the plaintiff has none: *Austen v. Howard*, 7 Taunt. 327, 1 J. B. Moore, 68; *Turnor v. Turner*, 2 Brod. & Bingh. 107; *Thompson v. Farden*, 1 M. & G. 535, 1 Scott, N. R. 275; 1 Wms. Saund. 195 b, n. By the 78th section of the act, it is enacted that five of the judges of the superior courts of common law at Westminster, including the lord chief justice of the courts of Queen's Bench and Common Pleas, and the lord chief baron of the Exchequer, or one of the said chiefs at the least, shall have power to make and issue "all the general rules for regulating the practice and proceedings of the county-courts holden under this act, and also to frame forms for every proceeding in the said courts for which they shall think it necessary that a form be provided," &c.; and that the rules so made and the forms so framed, shall be observed and used in all the courts holden under this act; and, in any case not *expressly provided for herein, or by [424 the said rules, the general principles of practice in the superior courts of common law may be adopted and applied, at the discretion of the judges, to actions and proceedings in their several courts." Accordingly, shortly after the passing of the act, certain rules of practice and forms of proceeding were prepared by the judges, of which the 24th, 25th, and 26th are applicable to proceedings in replevin. The 24th provides,—“that, where any cattle, goods, or chattels taken as a distress for rent in arrear, or damage feasant, shall have been replevied by the sheriff, the party at whose instance such replevin shall have been made, shall enter his plaint in the court held under the authority of this act, for the district within which such distress may have been made.” The 25th provides, that, “on entering a plaint in replevin, the plaintiff must specify and describe in a statement of particulars, the cattle, or the several goods and chattels taken under the distress, and of the taking of which he complains.” And the 26th provides, that, “all actions of replevin in cases of distress for rent in arrear or damage feasant, shall be tried in a summary way, as other actions in the courts held under the authority of this act; and the judgment therein, in ordinary cases, whether for plaintiff or defendant, shall be according to the forms in

the schedule, or to the like effect." The argument on the part of the defendants will be, that the jurisdiction of the old county-court as to replevins is still subsisting, and that the plaint is still to be entered there; though possibly it may be removable thence to the new court, by force of the 4th section of the 9 & 10 Viet. c. 95.(a) That notion, however, proceeds *425] upon *the fallacious assumption that the *querimonia* in the statute of Marlebridge, is identical with the plaint or declaration, in the county-court. The word "may" in that section is to be read "must;" as in the statute 8 & 9 W. 3, c. 11, s. 8, for assigning breaches of covenant.(b) [MAULE, J. I do not understand it to be contended here that this is a case in which the county-court has no jurisdiction. *Bramwell*. The defendants cannot, and do not, rely on s. 4.] In 2 Inst. 139, Lord COKE, commenting upon that statute, says: "The mischiefs before this statute were, first, where a man's beasts or other goods were distrained and impounded, the owner of the goods had no remedy but a writ of replevin;(c) by which delay the beasts or other goods were long detained from the owner, to his great loss and damage: secondly, where the beasts or other goods were distrained and impounded within any liberty that had return of writs, the sheriff was driven to make a warrant to the bailiff of the liberty to make deliverance, and that wrought a longer delay; for, at the common law, he could not enter into the liberty in that case. A third mischief was, when the distress was taken out of the liberty, and impounded within. Now, this statute doth apply cures to all these three mischiefs. '*Post querimoniam inde sibi fact*', &c. That is, the sheriff, upon a plaint made unto him without writ, may, either by parol, or by precept, command his bailiff to deliver them, that is, to make replevin of them; and by these words, '*post querimoniam sibi fact*,' the sheriff may take a plaint out of the county-court, and make replevin *426] *presently (which *he ought to enter in the county-court*; for, it should be inconvenient, and against the scope of this statute, that the owner, for whose benefit the statute was made, should tarry for his beasts to the next county-court, which is holden from month to month." The entering of the plaint which is the beginning of the proceedings in the county-court, is the act, not of the sheriff, but of the party: *Ex parte Boyle*, 2 D. & R. 13. And, until the sheriff has taken pledges, there is no suit in the county-court: *Tesseyman v. Gildart*, 1 New Rep. 292. Most of the authorities upon this subject will be found collected in 1 Wms. Saund. 195, *et seq.* [MAULE, J. And also in Selwyn's Nisi

(a) Which enacts, "that, for all purposes, except those which shall be within the jurisdiction of the courts holden under this act, the county-court shall be holden as if this act had not been passed: and all proceedings commenced in the county-court of any county before the time when any court shall be holden under this act in such county, may be continued, executed, and enforced against all persons liable thereunto, in the same manner as if they had been commenced under the authority of this act."

(b) See Wms. Saund. 57, n. (1).

(c) And see H. 21 H. 6, Fitz. abr. tit. *Retourne de Viscount*, pl. 17.

Prius, 11th edit. p. 1187, *et seq.*] It may probably be insisted, that, if this bond is void, it is because the jurisdiction of the sheriff to grant replevins is taken away by the 9 & 10 Vict. c. 95. That, however, is not so. It would require strong words to relieve the sheriff from a duty so early and so stringently imposed upon him. [MAULE, J. Who is to take the bond, if the sheriff does not?] No one.

The next objection is, that the learned judge improperly received the bond in evidence, the attesting witness not having been called. The defendants had had notice to produce the bond; and, upon its being called for at the trial, and the defendants' counsel declining to produce it, the plaintiff's counsel tendered a copy, which was proved to have been obtained from the sheriff's office. The copy being about to be read, the defendants' counsel interposed the original, and then insisted that it could not be read without first calling the subscribing witness. The learned judge, however, ruled, and properly ruled, that the objection came too *late*. The rule is laid down in *Jackson v. Allen*, 3 Stark. N. P. C. 74, in terms precisely applicable to this case. [*42] [MAULE, J. What right had the defendant's counsel thus to intrude evidence for the plaintiff?] None whatever. The real object was, to compel the plaintiff to put the officer, who was the real defendant, into the box.

The last objection is that there was no evidence to warrant the jury in finding substantial damages. Rent was due to the extent of 35*l.*; and the bond itself was, as against the defendants, evidence of the value of the goods seized. The amount of damages was clearly for the jury: *Clifton v. Hooper*, 6 Q. B. 468. In *Williams's Saunders*, 6th edit., Vol. I. p. 195, h. n. (3), it is said: "There is a difference of opinion as to what extent (the extent to which) the sheriff is liable to render damages in an action on the case for taking insufficient pledges in distresses for rent. In the case of *Yea v. Lethbridge*, 4 T. R. 433, it was held by the Court of King's Bench that the plaintiff is not entitled to recover his costs of the defence of the replevin, but merely the value of the distress taken; for, if the sheriff had taken two responsible sureties, according to the 11 G. 2, the bond would have been satisfied by returning the goods taken; therefore the value of those goods seemed to the court to be the true measure of damages to be given in this action. But, in a subsequent case, the court of Common Pleas held that the plaintiff might recover in the action the real damages he has sustained, notwithstanding they exceed the penalty of the bond: *Concanen v. Lethbridge*, 2 H. Blac. 36. And afterwards, in *Evans v. Brander*, 2 H. Blac. 547, the court of Common Pleas was of opinion that the penalty of the bond ought to be the measure of the damages against the sheriff." And in the note (p) **Heford v. Alger*, 1 Taunt. 218, *Ward v. Henley*, 1 Y. & J. 285(a) [*428 and *Jeffery v. Bastard*, 4 Ad. & E. 823, 6 M. & M. 303, are cited: and

it is said—"These cases have overruled *Concanen v. Lethbridge*, and have settled, that the penalty of the bond is the limit beyond which the amount of damages cannot range. They have also overruled *Yea v. Lethbridge*, inasmuch as they establish, that, within that limit, the sheriff is liable beyond the value of the distress taken: *Paul v. Goodluck*, 2 N. C. 220. But they do not establish any absolute rule (as at first sight they may seem to do), that, within that limit, the sheriff is liable to the extent of the *rent* in arrear at the time of the distress, and the costs of the replevin suit. They warrant, indeed, that proposition, in cases where the value of the *goods seized* exceeds the amount of the rent due. But, where the value of the goods is less than the rent in arrear, the liability of the sheriff does not extend beyond that value, and the costs: *Hunt v. Round*, 2 Dowl. P. C. 558; *Gingell v. Turnbull*, 3 N. C. 881, 5 Scott, 153; *Miers v. Lockwood*, 9 Dowl. P. C. 975. The liability of the sheriff is co-extensive with that of the sureties." 2 H. Blac. 550; 3 Bingh. 59, 60; 2 N. C. 221; *Willie v. Birch*, 4 Q. B. 566, is very much in point; as is also *Perreau v. Bevan*, 5 B. & C. 284. In *Bales v. Wingfield*, 4 Q. B. 580 (a), which is relied on for the defendants, the plaintiff was deprived of no security; it has therefore no application to a case like this, where the plaintiff loses the security of the goods.

Bramwell and *J. Burchell*, in support of the rule. At common law, the sheriff, in cases of replevin, derived his jurisdiction from the original writ sued out of Chancery. The proceeding by writ being superseded *by the statute of Marlebridge, 52 H. 3, c. 21, the *querimonia*,^{*429} or plaint to the sheriff, became the foundation of his authority. This clearly appears from 2 Inst. 139, Gilbert on Distresses, 85, and the forms in Tidd's Appendix, 8th edit. pp. 588—603; notwithstanding the intimation to the contrary thrown out in Atkinson on Sheriffs, p. 72, edit. 1847, and adopted in Udall on County-Courts, p. 156, n. Unless, indeed, *querimonia* means "plaint" in the sense of being the commencement of the proceedings in the county-court, there is nothing whatever to warrant the proceeding there. *Tesseyman v. Gildart*, and *Ex parte Boyle* are in no degree inconsistent with this view. [MAULE, J. *Ex parte Boyle* only shows that the plaint, whatever it is, is not a proceeding in the superior court. It may be the sheriff's duty to enter the plaint: and yet it does not follow that he is to be coerced for a neglect of that duty, as if he were acting as the minister of the superior court.]

That part of the former statutory provision relating to the entry of the plaint in the county-court, is repealed by the 9 & 10 Vict. c. 95, ss. 119, 120, and with it the duty of the sheriff to take replevin-bonds. [MAULE, J. Surely that duty would not be taken away from the sheriff without being conferred upon somebody else.] It may be that the *querimonia*, which was formerly made to the sheriff, shall now be made to the new county-court. [MAULE, J. That clearly cannot have been meant. But the plaint having been made to the sheriff as before, and

the sheriff having granted a replevin, the recent statute provides, that, instead of declaring in the old county-court, the party shall come and lodge a plaint in the new county-court. There is nothing in the statute to militate against that *construction; and a contrary one would [*430 be to suppose the whole action of replevin entirely gone.] The high bailiff may very well in this respect be the officer to perform the duty which was before performed by the sheriff. The 121st section of the 9 & 10 Vict. c. 95, enacts, "that, in case either party to any such action of replevin shall declare to the court in which such action shall be brought, that the title to any corporeal or incorporeal hereditament, or to any toll, market, fair, or franchise, is in question, or that the rent or damage in respect of which the distress shall have been taken, is more than the sum of 20*l.*, and shall become bound, with two sufficient sureties, to be approved by the clerk of the court, in such sums as to the judge shall seem reasonable, regard being had to the nature of the claim, and the alleged value or amount of the property in dispute, or of the rent or damage, to prosecute the suit with effect and without delay, and to prove before the court by which such suit shall be tried, that such title as aforesaid is in dispute between the parties, or that there was ground for believing that the said rent or damage was more than 20*l.*, then, and not otherwise, the action may be removed before any court competent to try the same, in such manner as hath been accustomed." The result is, that two bonds may now be necessary. [MAULE, J. The new county-court has only jurisdiction in cases of distress for rent in arrear and damage feasant. If the distress is for neither of these, and the value exceeds 20*l.*, there is still something for the sheriff to do.] The sheriff has no means of knowing what the distress is for, and the parties are not bound to tell him. And, if the plaint is not to be recorded in the sheriff's court, how is the party to get a return of the goods?

Assuming the jurisdiction of the sheriff to take replevin-bonds to be still subsisting, the bond in the present case is in the proper form. The plaint must *still be entered in the sheriff's court: the plaint in [*431 the district court is quite independent of that. The bond, therefore, properly calls on the party to prosecute her suit with effect, and in the appropriate place. A bond is not bad merely because it contains something more than is requisite. There are many cases in which bonds not strictly taken in conformity with the statute 11 G. 2, c. 19, are assignable, within the statute, so as to enable the assignee to maintain an action for a breach of a branch of the condition which is well taken: *Gwillim v. Holbrook*, 1 Bos. & Pull. 410. In *Short v. Hubbard*, 9 J. B. Moore, 667, the bond was held good, though it contained a condition to indemnify the sheriff. And in *Dunbar v. Dunn*, 10 Price, 54, the bond was held to be assignable, although not conditioned to prosecute the suit without delay. If, by reason of the alterations introduced by the late statute, the bond has become useless, or difficult to put in suit, the sheriff

is not responsible for that. [MAULE, J. He certainly incurs no responsibility if he takes a bond in the form required by the statute 11 G. 2, c. 19. But the question is, has he done so here?] The bond will not be vitiated by surplusage. [MAULE, J. The difficulty I feel, is, to see that the plaintiff in replevin had anything to do in the sheriff's court.] He is there to make a formal entry of the plaint. [MAULE, J. The entry of the plaint is the sheriff's duty.] The contrary was held in *Ex parte* Boyle. [MAULE, J. Upon whom ever the duty of entering the plaint was cast under the old course of proceeding, he must now do it in the district court. Every proceeding in the new county-court is to be by plaint,—which is equivalent to a declaration.] Still it is necessary that the *querimonia* should be entered in the old county-court. [MAULE, *432] J. *It is somewhat strange if an entry be still required to be made in a court that is almost entirely stripped of its functions. If two plaints are requisite, are not both to be entered in the new county-court?] It is submitted that they are not: the act of the sheriff is supposed to be done in his own court.

As to the necessity for calling the attesting witness,—having entitled themselves to read the copy, the plaintiff's counsel perhaps need not have put in the original bond; but, having put it in, they were bound to make it legal evidence. [Baines. It was the copy that was in fact read. MAULE, J. Whether the thing read was the original or the copy, is perfectly immaterial.] Lord ELLENBOROUGH, in *The King v. The Inhabitants of Haringworth*, 4 M. & S. 350, says that the rule which requires the subscribing witness to be produced, or his absence accounted for, is “as fixed, formal, and universal as any that can be stated in a court of justice.” In *Call v. Dunning*, 4 East, 53, the answer of the obligor of a bond to a bill filed for a discovery, in which he admitted the bond to have been executed by him, was held to be only secondary evidence, and not receivable as evidence *per se* of the execution, without showing that due diligence had been used to discover who the subscribing witness was (who was alleged to be unknown). So, in *Gordon v. Secretan*, 8 East, 548, it was laid down, that, where an instrument is produced at the trial by one of the parties, in consequence of notice from the other, which instrument when produced appeared to have been executed by the party producing it and third persons, and to be attested by a subscribing witness,—the production of it in that manner does not *433] dispense with the necessity of proving the *instrument by means of the subscribing witness, though unknown before to the party calling for it. In *Gillett v. Abbott*, 7 Ad. & E. 783, in an action of covenant for not indemnifying the plaintiff against liabilities incurred by him as trustee under a former deed, to which the plaintiff and defendant were parties, the declaration set out the deed of indemnity, which recited in part the deed of trust: the defendant pleaded that he did not become liable by reason of his having been trustee under the trust deed, nor was

the loss complained of a consequence of the trusts, or of the plaintiff's having been such trustee as aforesaid: and it was held, that neither the form of the issue, nor the recital in the deed of indemnity, entitled the plaintiff to put in the deed of trust, without proof, by the subscribing witness, of its execution. In *Collins v. Bayntun*, 1 Q. B. 117, the defendant,—to prove that he had been in partnership with the plaintiff,—offered in evidence a written contract purporting to be made by the plaintiff and defendant, as partners, with K., a builder, for work to be done by K. upon the premises where the plaintiff carried on the business in which the defendant alleged himself to be partner. The document was in the plaintiff's custody, and produced by him on notice: and it was held, that the contract was not admissible without proof of the execution, as an instrument under which the plaintiff claimed an interest. Upon these authorities, it is perfectly clear that the plaintiff could only entitle himself to read the bond by calling the subscribing witness, and that nothing that occurred at the trial relieved him from the necessity of so doing.

As to the damages. There was no doubt the rent was due. But the damages to which the sheriff in such a case is liable, are not inevitably the amount of *the rent or the value of the goods. The rent may have been paid; or the party may be capable of paying it: the plaintiff was bound to give some evidence of actual damage. [MAULE, J. He does give some evidence of damage, by showing that the rent was due, and that the goods were sufficient to satisfy it.] In actions against the sheriff for escape on mesne process, the plaintiff is always called upon to prove the amount to which he is damnified: *per* LITTLEDALE, J., in *Scott v. Henley*, 1 M. & Rob. 227. And in *Morris v. Robinson*, 3 B. & C. 196, HOLROYD, J., says—"In an action against a sheriff for an escape, small damages are often given, on the ground that the debt is not extinguished, and the whole amount may afterwards be recovered, notwithstanding the recovery against the sheriff." In *Bales v. Wingfield*, 4 Q. B. 580 (a), nominal damages only were held to be recoverable for the negligent execution by the sheriff of a writ of *fi. fa.*, in the absence of proof of actual damage.

The declaration is bad in arrest of judgment, for the reasons stated on moving for the rule. *Cur. adv. vult.*

COLTMAN, J., now delivered the judgment of the court.(a)

This was an action brought against the sheriff of Middlesex, for not having taken a replevin-bond, in conformity with the statute 11 G. 2, c. 19, s. 23.

The cause was tried before my brother CRESSWELL, and a verdict was found for the plaintiff, for 35*l.*: but leave was reserved to enter a verdict for the defendants, if the court should be of opinion that the bond which was taken, was sufficient within the meaning of the act.

(a) The judges present at the argument, were, COLTMAN, J., MAULE J., and CRESSWELL, J.

*435] *In the same term, a rule nisi was obtained for entering the verdict for the defendant, or for a new trial, or to arrest the judgment.

It appeared by the judge's report, that the distress out of which the action arose, was taken within the district of the Whitechapel County-court of Middlesex: and the condition of the bond was, that the obligor should appear at the next county-court for the county of Middlesex, to be holden at the house known by the name of The Sheriff's Office, in Red Lion Square, and should then and there prosecute her action with effect against George Ellis, for taking and unjustly detaining her goods, to wit, &c., and make return thereof, if return should be adjudged by law.

The bond which has been taken in this case, is in a form often used before the passing of the 9 & 10 Vict. c. 95: and the question is, whether such a form, since the passing of that statute, is sufficient.

By the 119th section of the act, all actions of replevin, in cases of distress for rent in arrear, which shall be brought in the county-court, shall be brought, without writ, in a court held under the act: and, by s. 120, the plaint shall be entered in the court holden for the district wherein the distress was taken.

As this statute leaves the former statutes relating to replevin unrepealed, there is no reason why the sheriff, on complaint made to him, should not grant replevin, as before, and take bond under the statute 11 G. 2, as before; and, if the bond were taken in the terms of the statute, conditioned to prosecute the suit with effect and without delay, and to make return, if return should be awarded, the sheriff would have been under no difficulty. But, the bond being taken with a condition for the plaintiff to appear at the next county-court for the county of Middlesex, to be holden at the Sheriff's Office, in Red Lion Square, and *then and* *436] *there to* *prosecute her action with effect, and to make return, if return should be adjudged,—the question arises, whether such a bond is sufficient.

Various cases are to be found, in which the courts have held that bonds not strictly conformable to the statute of G. 2, are assignable within that statute, so as to enable the assignee to maintain an action on the bond, where there had been a breach of one of the branches of the condition which had been taken conformably to the statute. Thus, in the case of *Short v. Hubbard*, 9 J. B. Moore, 667, it was held to be no objection to such a bond, that it was conditioned, *inter alia*, to indemnify the sheriff. So, in *Dunbar v. Dunn*, 10 Price, 54, where the bond was conditioned to prosecute with effect, to make return, if, &c., and to indemnify the sheriff,—it was held that the assignee might sue on the bond, though it was not conditioned to prosecute the suit without delay. These were questions between the assignees of the sheriff and the obligors of the bond: but the question may be different, when it arises between the

party distraining and the sheriff, who has taken a bond not conformable to the statute.

In order to determine this question, it will be convenient to consider the effect of a bond taken in the form here used, before the passing of the statute 9 & 10 Vict. c. 95. The object of taking a bond conditioned for the obligor to appear at the next county-court, and then and there to prosecute his suit, appears to be, to secure the commencement of the action without delay, so as to meet the requirement of the statute, that the obligor shall prosecute his suit without delay; and, if the obligor omitted to appear at the next county-court, and there prosecute his suit, it was an infringement of the statute, and the bond was forfeited, and *might be put in suit by the assignee: *Dias v. Freeman*, 5 T. R. 195. The effect and meaning of a bond conditioned like the bond now in question, was under the consideration of the court of Exchequer, in the case of *Jackson v. Hanson*, 8 M. & W. 487: and the court held the meaning of such a bond to be, that the obligor should appear at the next county-court, and then and there begin to prosecute his suit, and afterwards prosecute it with effect: and, by prosecuting with effect, is meant, prosecuting with effect, not only in the county-court, but in every other court into which the cause may be removed in ordinary course: *Chapman v. Butcher*, Carth. 248; *Gwillim v. Holbrook*, 1 Bos. & Pull. 410. Now, the meaning which ought to be put on the bond is not altered by the passing of the statute 9 & 10 Vict. c. 95: and the question will be, whether such a bond still is a substantial compliance with the requisitions of the statute 11 G. 2.

The condition of the bond being,—first, that the obligor shall appear at the next county-court, and then and there begin to prosecute his suit, this branch of the condition will be merely idle, if the effect of the statute of Victoria is, to substitute a proceeding in the district court in lieu of the old proceeding in the county-court. And it appears to us that such is the intention and effect of the act.

The words of the act,—s. 119,—are express, that all actions of replevin, in cases of distress for rent, shall be brought in a court held under the act: and it cannot be supposed that the plaintiff in replevin is to bring two concurrent actions,—one in the old county-court, the other in the district court: it must, therefore, be intended that the proceeding in the district court shall be substituted in lieu of the former proceeding in the county-court.

*It may be said, however, that, although this branch of the condition is idle, and imposing a duty on the obligor which the statutes do not any longer warrant, and for a breach of which the assignee of the bond could maintain no action, yet, the rest of the condition is conformable to the statute of 11 G. 2, and may be enforced by the assignee of the bond.

Now, the remaining branch of the condition is, that the obligor shall

VOL. VII.—35

prosecute his suit with effect; and, the proceeding in replevin having been well commenced, in the first instance,—by the plaint to the sheriff out of court, and the bond entered into to him,—and the proceedings being, in effect, by force of the act of 9 & 10 Vict. c. 95, directed to be transferred to the district court, and there prosecuted, the effect of this portion of the condition may be, to bind the obligor to prosecute with effect in the district court; on the same principle on which it was held that such a condition bound him to prosecute, not only in the sheriff's court, but in every other court into which the cause might be removed in due course of law.

Still, there is another requisition of the statute, which the bond does not comply with; for, the bond should be conditioned for the prosecuting of the suit *without delay*. As the law stood before the passing of the statute 9 & 10 Vict. c. 95, this was considered as being sufficiently provided for by requiring the obligor to appear at the next county-court, and then and there to prosecute his suit; but this provision is no longer applicable; the suit is no longer to be prosecuted in the county-court, but in the district court. The district courts are to be held, by section 56, at such times as the judge shall appoint: and it may well be that the court for the district within which the distress was taken, and in which the plaintiff ought to enter his plaint, will be holden before the *439] holding of the *next county-court in the Sheriff's Office, in Red Lion Square: and, be that as it may, there is no condition requiring the plaintiff to prosecute his suit at the next or any other district court; and the proceeding may be indefinitely delayed, without any breach of the condition of which the assignee of the bond can take advantage.

We think, therefore, that the bond is insufficient, and, consequently, that the defendants are not entitled to have a verdict entered for them.

The ground on which the application for a new trial was rested, was, a supposed misdirection in receiving in evidence the replevin-bond, without due proof of the execution by the subscribing witness.

It appeared by the report, that notice had been given to the defendants to produce the bond. The plaintiff's counsel called for the bond; which the defendants' counsel declined to produce. On the part of the plaintiff, a copy was produced, and proved to have been obtained from the sheriff's office, and was about to be read: whereupon, the counsel for the defendants produced the original, and insisted that it could not be read until the subscribing witness had been called. The document, however, was read, without the production of the witness: and it is contended that this ought not to have been done.

We are, however, of opinion that the evidence was properly received. The document having been, in the first instance, kept back, and the plaintiff having entitled himself to read a copy, without any proof being given that there was a subscribing witness to the original instrument,

and having put it in to be read, the defendants' counsel had let slip their opportunity, and had no right then to interpose, and produce the original: and although, in point of fact, the original was read, that was by a sort of legerdemain; and the *proper evidence must be considered as having been read,—which was, the copy produced and proved by the counsel for the plaintiff. [440

The case of *Jackson v. Allen*, 3 Stark. N. P. C. 74, bears out our view of the rights of the plaintiff's counsel under such circumstances.

Another ground on which the motion for a new trial was rested, was, the amount of the damages,—which were, to the whole amount of the rent distrained for. But we see no reason to think them too large. If a bond had been taken, conditioned to prosecute without delay, the bond, under the circumstances of this case, would have been forfeited, and the amount of the rent would have been a reasonable measure of the damages.

The case is not like the case of an escape on *mesne* process; for, the distrainer has a real security for his debt: and, if the replevin had not been granted, he would have sold the goods, and would have put the money in his pocket. If a replevin-bond is taken, and afterwards forfeited, or if the sheriff omits to take a bond with a proper condition, the plaintiff ought to be put in as good a situation as he was in before.

The ground on which it was sought to arrest the judgment, was, that the declaration only alleged that the county-court had not jurisdiction *at the time of taking the bond*, and that it ought to have alleged a want of jurisdiction *at the time of the plaint* to the sheriff: but we think that this is in substance alleged; for, the allegation that the county-court had not jurisdiction, at the time of taking the bond, to try an action of replevin for taking and detaining the said goods, would not be true, if it had had jurisdiction at the time of the plaint to the sheriff; for, if it had had jurisdiction at that time, its jurisdiction having once *attached, would have continued, by virtue of the 4th section of [441 the act, and would have existed at the time of taking the bond.

The rule, therefore, must be discharged.

Rule discharged.

MURRAY, ASH, and KENNEDY, v. HALL. Feb. 14.

Trespass quare clauum fregit lies by one of several tenants in common against his co-tenant, where there has been an actual expulsion.

THIS was an action of trespass for breaking and entering the dwelling-house of the plaintiffs, and expelling them therefrom, and seizing and converting their goods.

The defendant pleaded,—first, not guilty,—secondly, as to the breaking and entering the dwelling-house, leave and license,—thirdly, that

the premises were not the premises of the plaintiffs,—fourthly, as to the goods, leave and license,—fifthly, that the goods were not the goods of the plaintiffs: upon which issue was joined.

The cause was tried before MAULE, J., at the sittings at Westminster, in Easter term, 1847. The facts that appeared in evidence were as follows:—The three plaintiffs and one Hart had jointly become tenants of the premises in question,—a room used as a coffee-room by the members of a temperance society,—to one Hall. On the 23d of November, 1846, the defendant and Hart forcibly expelled from the premises a person named Adams, who had been placed there by Murray.

On the part of the defendant, it was proved that Hart, on the 5th of *442] November, 1846, surrendered his *interest to the defendant, by a document of which the following is a copy:—

“ Mr. W. Hall,

“ Sir,—The premises I and my co-partners hold of you, being situated No. 11 Stacey Street, St. Giles's, I, in the name of the same, give up, as we cannot pay you the rent due, my co-partners having misapplied the same.

“ Yours, &c.

“ JOHN HART.”

“ P. S. I have given the key to Mr. G. for you.”

It was then insisted, for the defendant, that the surrender by Hart at all events enured as a surrender of *his own* interest, and made Hall tenant in common with the three plaintiffs; and that one tenant in common could not maintain trespass against his companion, even for an actual expulsion: *Cubitt v. Porter*, 8 B. & C. 257, 2 Mann. & R. 267.(a)

On the part of the plaintiffs, it was objected, that since the new rules, a surrender must be pleaded specially.

The learned judge told the jury, that, if the evidence satisfied them that there had been an actual expulsion of the plaintiffs from the premises by the defendant, their verdict ought to be for the plaintiffs.(b)

The jury returned a verdict for the plaintiffs, damages 35*l*.

Wallinger, in the course of the same term, obtained a rule nisi to enter a nonsuit, pursuant to leave reserved.

Parry, in Easter term last, showed cause. That one of several tenants in common may maintain *ejectment* *against his co-tenant, will *443] not be disputed. The question is whether *trespass* also is not maintainable, where there has been an actual expulsion of one tenant in common by his companion. *Wilkinson v. Haygarth*, 16 Law Journ., N. S., Q. B. 103, is a distinct authority that it is. It was there held that trespass lies by one tenant in common against his co-tenant (or the lessee of the latter) for digging up and carrying away the soil of the close (peat) of which they are tenants in common; such an act being an ouster. And Lord DELMAN says: “ My notion of peat is, that it is not anything

(a) And see *Wiltshire v. Sidford*, 1 Mann. & R. 403.

(b) The jury were discharged, by consent, as to the fourth and fifth issues.

growing, but that it is decayed vegetable matter, which has become a part of the soil itself,—part of the close which is the subject-matter of this co-tenancy. Now, it is admitted,—indeed it could not be denied,—that an actual ouster will entitle one tenant in common to maintain trespass against his co-tenant; and that the taking of some things is an ouster. There can be no doubt, the destruction of the thing itself is an ouster. Here, the thing itself is destroyed by the act of the defendant: and *Clayton v. Corby*, 5 Q. B. 415, is a distinct authority that one tenant in common may maintain the action of trespass against the other, when that which is the subject of the common property and enjoyment has ceased to exist in consequence of the wrongful act of such co-tenant." In *Cubitt v. Porter*, the alleged trespass was, the pulling down a party-wall, for the purpose of rebuilding: that clearly was no destruction of the subject-matter of the tenancy in common.

At all events, this defence was not open to the defendants, it not having been pleaded specially. A question of title cannot be raised under a plea of possession. *Heath v. Milward*, 2 N. C. 98, 2 Scott, 160; *Browne v. Dawson*, 12 Ad. & E. 624. Lord *DENMAN, in delivering the judgment of the court of Queen's Bench, in *Whittington v. Boxall*, 5 Q. B. 139, says: "If the defendant not only contests the possession in fact, but also relies upon title, in case actual possession is proved by the plaintiff, it is far more consistent, not only with the object of the new rules, but with the rules of pleading generally, and with the principles of justice, that his defence on the ground of title should be pleaded specially, and not given in evidence under a traverse of an allegation in the plaintiff's declaration, which is satisfied by proof of possession only. If the defendant contests the *prima facie* title of the plaintiff, he is at liberty to do so under the plea denying that the close is his: but, if he means to set up superior title in answer to the *prima facie* title of the plaintiff, he should plead in confession and avoidance. The court of Common Pleas, in the case of *Heath v. Milward*, and this court, in the case of *Browne v. Dawson*, took the same view of the effect of traversing the allegation that the close is the close of the plaintiff, and considered that it put the possession only, in issue." And, after referring to *Purnell v. Young*, 3 M. & W. 288, where PARKE, B., says that "the plea denying the close to be the plaintiff's, since the new rules, is a denial of the plaintiff's title to the close, to the same extent that he would have been obliged to prove it before, under the general issue," his lordship continues,—“With the greatest respect for the opinion of that very learned judge, we cannot, for the reasons already given, come to the same conclusion. It does not appear to us to be warranted by any sufficient analogy between the general denial before the new rules, in the plea of not guilty, of the defendant's being a trespasser *modo et forma*, and a plea traversing only one of the plaintiff's allegations. The same effect *cannot, in our opinion, be given to both, in allowing the

defendant not only to contest the possession, which, if proved, satisfies the allegation traversed, but also to avoid the effect of it, by giving evidence showing that the defendant is himself entitled to the possession. This dictum in *Purnell v. Young* is that from which alone we dissent, concurring fully with the *decision* of that case."

Channell, Serjt., and *Wallinger*, in support of the rule. The substance of the charge in the declaration is, the breaking and entering the premises; the expulsion is alleged merely as matter of aggravation: a justification of the breaking and entering, therefore, in the absence of a new assignment, answers the whole charge: *Layton v. Grindall*, 2 Salk. 643; *Bennett v. Allcott*, 2 T. R. 166; *Taylor v. Cole*, 3 T. R. 292; *Taylor v. Wells*, 2 Wms. Saund. 74 a. It is not contended that Hart could surrender the interest of his co-tenants: but it is submitted that the effect of the document signed by him on the 5th of November, 1846, was, to make the defendant tenant in common with the plaintiffs and the other parties. It may be conceded that ejectment may be maintained by one tenant in common against his co-tenant, where there has been an actual ouster: but it is insisted, notwithstanding the case of *Wilkinson v. Haygarth*, that one tenant in common cannot, under the like circumstances, maintain trespass. The reasoning that applies in the one case is inapplicable in the other. There are several authorities upon the subject that were not adverted to in *Wilkinson v. Haygarth*. Thus, LITTLETON, in § 319, says: "Also, as there be tenants in common of lands and tenements, &c., as aforesaid, in the same manner there be of *446] chattels reals and personals. As, if *a lease be made of certain lands to two men, for term of twenty years, and when they be of this possessed, the one of the lessees grant that which to him belongeth to another during the term, then he to whom the grant is made and the other shall hold and occupy in common." § 320. "Also, if two have jointly the wardship of the body and land of an infant within age, and the one of them grant to another that which to himself belongeth of the same ward, then the grantee, and the other which did not grant, shall have and hold this in common, &c." § 321. "In the same manner it is of chattels personals. As, if two have jointly, by gift or by buying, a horse or an ox, &c., and the one grant that to him belongs of the same horse or ox to another, the grantee, and the other which did not grant, shall have and possess such chattels personals in common. And, in such cases, where divers persons have chattels real or personal in common, and by divers titles, if the one of them dieth, the others which survive, shall not have this as survivor, but the executors of him which dieth shall hold and occupy this with them which survive, as their testator did or ought to have done in his lifetime, &c., because that their titles and rights in this were several, &c.," § 322. "Also, in the case aforesaid, as, if two have an estate in common for term of years, &c., the one occupy all, and put the other out of possession and occupation, he which is put

out of occupation shall have against the other a writ of *ejectione firmæ* of the moiety, &c." § 323. "In the same manner it is, where two hold the wardship of lands or tenements during the nonage of an infant, if the one oust the other of his possession, he which is ousted shall have a writ of *ejectment de gard*, of the moiety, &c., because that these things are chattels reals, and may be apportioned and severed, &c., but no action of trespass, viz., *quare clausum suum fregit, et herbam suam, &c., conculcavit et consumpsit, &c., et hujusmodi *actiones, &c.*, the one [447 cannot have against the other, for that each of them may enter and occupy in common, &c., *per my et per tout*, (a) the lands and tenements which they hold in common. But if two be possessed of chattels personals in common by divers titles, as, of a horse, an ox, a cow, &c., if the one take the whole to himself out of the possession of the other, the other hath no other remedy but to take this from him who hath done to him the wrong, to occupy in common, &c., when he can see his time, &c. In the same manner it is of chattels reals, which cannot be severed, —as, in the case aforesaid, where two be possessed of the wardship of the body of an infant within age, if the one taketh the infant out of the possession of the other, the other hath no remedy by an action of the law, but to take the infant out of the possession of the other when he sees his time." Lord COKE, in commenting upon these sections, says: (b) "Here, by this and the other, &c., in these two sections, are to be understood divers diversities between actions which concern right and interest (as, if *ejectione firmæ*, *ejectment de gard*, *quare ejecit infra terminum* of a chattel real upon an expulsion or ejectment), and actions concerning the bare taking of the profits arising off the land, or doing of trespass upon the land, as hereby the examples do appear; for, the right is several, and the taking of the profits in common. The second diversity is between chattels real that are apportionable or severable, as, leases for years, wardships of lands, interest of tenements by *elegit* statute-merchant, staple, &c., of lands and tenements, and chattels real entire, as, wardship of the body, a villein, for years, &c., for, if one tenant in common take away the ward or the villein, &c., the other hath no remedy by action, but he may take them again. Another diversity *is, [448 between chattels reals and chattels personals; for, if one tenant in common take all the chattels personals, the other hath no remedy by action, but he may take them again: and herein the like law is concerning chattels reals entire and chattels personal, for this purpose. But of chattels entire, as, of a sheep, horse, or any other entire chattel, real or personal, no survivor shall be between them that hold them in common: and tenants in common shall not join in an *ejectione firmæ*, nor in a writ of *ejectment de gard*, or a *quare ejecit infra terminum*, &c., for, these actions concern the right of lands, which are several. If two tenants in common be of a manor, to the which waif and stray doth belong, a stray doth happen, they are tenants in common of the same,

(a) See note at end of this case.

(b) Co. Litt. 199 b.

and if the one doth take the stray, the other hath no remedy by action, but to take him again. But, if, by prescription, the one is to have the first beast happening as a stray, and the other the second, there an action lieth if the one take that which pertains to the other. If two tenants in common be of a dove-house, and the one destroy the old doves, whereby the flight is wholly lost, the other tenant in common shall have an action of trespass *quare vi et armis columbare le pl' fregit et ducentas columbas, pretii 40s., interfecit, per quod volatum columbaris sui totaliter amisit*; for, the whole flight is destroyed, and therefore he cannot, in bar, plead tenancy in common. And so it is if two tenants in common be of a park, and one destroyeth all the deer, an action of trespass lieth. If two tenants in common be of land, and of mete stones, *pro metis et bundis*, and the one take them up and carry them away, the other shall have an action of trespass *quare vi et armis* against him, in like manner as he shall have for the destruction of doves." In Comyns's Digest, title *Estates Undivided*, (K. 8), it is said: "Tenants *449] in common are those who claim by several titles, or in several rights though by one title, and have their possession in common." If one actually ousts his companion of the possession, the other may maintain an ejectment against him. So, if one ousts the other of his ward, or other chattel real, the other shall have ejectment of ward against him. So, if one tenant in common destroys the flight of a dove-cote, the other shall have trespass. Or destroys all the deer in their park, &c. Or removes the mete-stones *pro metis et bundis terrarum suarum*." This action of trespass proceeds upon the footing that the plaintiff is entitled to the entirety. In *Cubit v. Porter*, LITLEDAL, J., says (8 B. & C. 268), "Assuming the parties to have been tenants in common of this wall, then it is said that trespass will lie in this case by one tenant in common against the other, because there was in this case a destruction of the subject-matter of the tenancy in common. In Comyns's Digest, title *Estates, by Grant*, (K. 8), there are various cases as to the remedy which one tenant in common has against another. It appears, that, with regard to actions in respect to matters not chattels, in some cases an ejectment will lie, if one actually oust his companion of the possession, and trespass will lie where there has been a complete and total destruction of the subject-matter of the tenancy in common: as, if one tenant in common destroys the *whole* flight of a dove-cote, or *all* the deer in their park. In other cases, where there has not been a total destruction of the subject-matter of the tenancy in common, but only a partial injury to it, waste, or an action on the case, will lie by one tenant in common against another: as, if one tenant in common of a wood or piscary does waste, against the will of the other, he shall have *450] waste; or, if one corrupts the water, the other shall have an action *on the case. There are other cases where the only remedy is, to retake the property: as, if one take a chattel real or per-

sonal entire, the other may retake it when he has an opportunity ; but he has no remedy by action. If, again, there be two tenants in common of a house or mill, and it fall into decay, the one is willing to repair, and the other will not, he that is willing shall have a writ *de reparatione faciendâ*. It has been said that trespass will lie in this case by one tenant in common against the other, because there has been an expulsion amounting to an actual ouster. Now, if there has been an actual ouster by one tenant in common, ejectment will lie at the suit of the other. But I am not aware that *trespass* will lie ; for, in trespass, the breaking and entering is the gist of the action ; expulsion or ouster is a mere aggravation of the trespass. If the original entry, therefore, be lawful, trespass will not lie." And, after referring to *Taylor v. Cole*, the learned judge continued—"Then, if the expulsion be mere aggravation, trespass will not lie for it, because the original entry is lawful. The original entry being the gist of the action in trespass, and the expulsion mere aggravation, I doubt much whether trespass can be maintained even for an expulsion." In *Wilkinson v. Haygarth*, the declaration charged the defendant with breaking and entering the close, and carrying away the soil thereof. Here, there is no charge beyond the breaking and entering the premises and expelling Adams therefrom. In that case it appears to have been thought by the court that the taking of the turf amounted to an actual ouster, and that therefore trespass would lie. That, however, is opposed to the earlier authorities above referred to. [COLTMAN, J. Upon which plea do you contend the defence arises ?] Upon not guilty, and also (more clearly) upon not possessed. The courts of Queen's Bench and Exchequer seem to have *entertained different views as to the effect of the plea of not possessed, in trespass. In *Cubit v. Porter*, the defend- [*451] ant was allowed to give evidence of title under the general issue. In *Purnell v. Young*, 3 M. & W. 288, it was held, that, to a declaration in trespass *quare clausum fregit*, a plea denying the close to be the plaintiff's, is a denial of possession, if the defendant was a *wrongdoer* ; if otherwise, of the right to the possession : but, on either supposition, it is a denial of title, as even possession is title against a wrongdoer. The point again arose in the court of Queen's Bench, in *Browne v. Dawson*, 12 Ad. & E. 624 : there, the master of a free school had possession of the school-room for the purposes of his office, but was summarily dismissed by the trustees for an alleged breach of the rules, and gave up the room, which was taken possession of by the trustees, and locked up. He returned on the next day, broke open the room, and held it for eleven days, at the end of which the trustees forcibly ejected him. He then brought trespass, describing the premises as "a room of the plaintiff." The defendants pleaded a plea denying that the room was the room of the plaintiff : and it was held that the plaintiff had not, by his re-entry, a *prima facie* right of possession against the trustees as wrongdoers ; and that they might set up the above facts in defence, without having pleaded "not possessed."

Heath v. Milward, 2 N. C. 98, 2 Scott, 160, having been cited there, Lord DENMAN said: "We think that case well decided, and agree, that the question of title is not to be raised on a plea of possession." In Whittington v. Bovall, 5 Q. B. 139, the court of Queen's Bench again held, that, in trespass *quare clausum fregit*, if issue be joined on a plea that the close was not the property of the plaintiff, in manner *and

*452] form, &c., the plaintiff's case is established, if he proves possession; and the defendant cannot, on such pleadings, offer evidence of title in himself. Lord DENMAN there says: "If the defendant not only contests the possession in fact, but also relies upon title in case actual possession is proved by the plaintiff, it is far more consistent, not only with the object of the new rules, but with the rules of pleading generally, and with the principles of justice, that his defence on the ground of title should be pleaded specially, and not given in evidence under a traverse of an allegation in the plaintiff's declaration, which is satisfied by proof of possession only. If the defendant contest the *prima facie* title of the plaintiff, he is at liberty to do so under the plea denying that the close is his: but, if he means to set up superior title in answer to the *prima facie* title of the plaintiff, he should plead in confession and avoidance. The court of Common Pleas in the case of Heath v. Milward, and this court in the case of Browne v. Dawson, took the same view of the effect of traversing the allegation that the close is the close of the plaintiff, and considered that it put the possession only in issue." And in Harrison v. Dixon, 12 M. & W. 142, 1 D. & L. 454, the court of Exchequer held, that, in trespass *de bonis asportatis*, a plea denying that the goods are the plaintiff's puts in issue the property in, as well as the possession of, the goods: PARKE, B., saying (12 M. & W. 145),—"The defendant should have denied that they were the goods of the plaintiff. The doctrine laid down by the court of Queen's Bench in Whittington v. Boxall, is applicable to land, and not to goods. How can a defendant dispute the plaintiff's title to goods, except by denying his possession? There is no plea of *liberum tenementum* in such a case. This court and the

*453] court of Queen's Bench have certainly come to a different *decision on the same point; the court of Queen's Bench having held that there ought to be a special plea in order to dispute the plaintiff's title, as distinguished from his mere possession: we have thought differently. Before the new rules, the general issue, not guilty, put in issue the plaintiff's title; because under that plea the plaintiff might dispute both the fact of the trespass, and also the fact that it was committed on the plaintiff's close. Now, the plea denying the close to be the plaintiff's, is a denial of his title, to the same extent as he would have been obliged to prove it under the general issue." The question is, to which of these conflicting opinions this court will adhere. In 14 Viner's Abridgment, 514,(a) it is said that "one tenant in common shall not have

(a) Title. Joint-tenants (S. a), pl. 4; translating Bro. Abr. Tenants in Common, pl. 22, where

an action of *trespass of a close broken*, against the other; but it is a good plea, that he and the plaintiff are tenants in common, and *shall show of whose feoffment specially*: the reason seems to be because it is of his own part: but, if this had been pleaded in the plaintiff with a stranger, it would be otherwise, as it seems; and so it appears there by the opinion of Danby." This shows that, even before the new rules, this defence must have been specially pleaded. *Cur. adv. vult.*

COLTMAN, J., now delivered the judgment of the court.

This was an action for breaking and entering the plaintiffs' dwelling-house, and expelling them therefrom; to which the defendant pleaded, —first, not guilty,—secondly, leave and license,—thirdly, a denial that the dwelling-house was the plaintiffs'.

*At the trial before MAULE, J., one ground of defence was, that [454 the defendant was tenant in common of the house with the plaintiffs, and that therefore the action was not maintainable. The learned judge told the jury, that, if the evidence satisfied them that there had been an actual expulsion of the plaintiffs from the house by the defendant, their verdict ought to be for the plaintiffs. The jury found for the plaintiffs, damages 35*l.*

The defendant afterwards obtained a rule to show cause why a nonsuit should not be entered (pursuant to leave given at the trial), on the ground that one tenant in common cannot maintain trespass against another, even though there has been an actual expulsion.

On showing cause, it was argued (before the lord chief justice, and justices COLTMAN, CRESSWELL, and V. WILLIAMS), that this defence, even if sustainable, ought to have been specially pleaded. It is unnecessary to give any opinion on this point; for, we are of opinion that the defence is not sustainable.

The court has felt some difficulty on the question, by reason only of the doubts expressed by LITLEDALE, J., in his judgment in *Cubit v. Porter*, 8 B. & C. 269. That learned judge there said, that, although, if there has been actual ouster by one tenant in common, ejectment will lie at the suit of the other, yet he was not aware that trespass would lie; for, that, in trespass, the breaking and entering is the gist of the action, and the expulsion or ouster is a mere aggravation of the trespass; and that, therefore, if the original trespass be lawful, trespass will not lie. It appears, however, to us difficult to understand why trespass should not lie, if ejectment (which includes trespass) may be maintained (as it confessedly may) on an actual ouster. And, as it has been further established, in the case of *Goodtitle v. Tombs*, 3 Wils. 118, that a tenant in common may maintain an action of trespass for *mesne profits [455 against his companion, it appears to us that there is no real foundation for the doubts suggested.

32 H. 6, fo. 14 (M. 32 H. 6, fo. 14, pl. 21), and *Fitch. Abr. title, Issue*, pl. 91, in which that case is well abridged, are cited.

We are, therefore, of opinion that the direction of MAULE, J., at the trial, was right; and consequently this rule must be discharged.

Rule discharged.(a)

(a) *Vide supra*, 446, n. In 2 Bla. Comm. 182, it is stated that "Joint-tenants are said to be seized *per my et per tout*; by the half, or moiety, and by all." It is true, that, for certain purposes, joint-tenants are potentially seized of aliquot parts of the land held by them in jointure; as, for the purpose of alienation in severalty, either by grant (Litt. s. 288), or by demise (Doe *d.* Errington, 3 N. & M. 647); so for the purposes of merger, (Preston on Merger, 447.) And, where the joint-tenancy happens to be between two persons only, their potential aliquot parts may, without impropriety, be termed *moieties*. But this is not, as the learned commentator, followed by numerous subsequent writers, has supposed, implied in the terms "*per my et per tout*;" the term "*my*" signifying not a "*moiety*," but "*not in the least*." See the epitaph on La Fontaine's Picard wolf, cited 7 M. & G. 172, n. And therefore Lord Coke gives the exact force of the expression "*seized per my et per tout*," by describing the party so seized as one *qui nihil habet et totum habet*.

Littleton was rightly understood by Houard, who translates, or modernizes, Litt. s. 288, thus: "On dit communément que chaque jointenant n'a la propriété de rien et est propriétaire de tout: ce qui veut dire qu'il tient tout conjointement, et ne tient rien en particulier. En effet, la terre, considérée en sa totalité, ou dans chacune de ses parties, ne lui appartient que conjointement avec son associé."—*Anciennes Loix des François*, Vol. I. p. 362.

Though in the books, it is said of *joint-tenants* only, that they are seized *per my et per tout*, the position seems to be equally applicable to all tenants who hold *pro indiviso*, whether they are joint-tenants, parceners, or tenants in common.

It may be thought somewhat extraordinary that Blackstone should not have suspected the true meaning of the old French negative "*my*," as he goes on to say, "They have not, one of them, a seisin of one half or moiety, and the other of the other moiety, neither can one be exclusively seized of one acre and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety:" for, he even cites the very accurate language of Bracton, "*Quilibet totum tenet, et nihil tenet; scilicet, totum in communi, et nihil separatim per se.*" And see 4 M. & G. 573, n.

*456] *DOE *d.* WILLIAM KINGLAKE *v.* DINAH BEVISS.

An ancient roll, found amongst the muniments of a manor, containing the reeve's account of moneys received by him on account of the lord, followed by an account of moneys expended by him on account of the lord, was tendered as evidence of a fact noticed in one of the items of discharge for which the reeve took credit in the account. This entry was rejected, on the ground that it did not appear on the face of the account that the reeve gave credit for any sum applied to the discharge of that particular item. Held, (by COLTMAN, MAULE, CRESSWELL, and V. WILLIAMS, JJ., *absente*, et, ut videtur, *dissentiente*, WILDE, C. J.), that the evidence was properly rejected.

EJECTMENT, for lands in the parish of Taunton-St.-Mary-Magdalen, in the county of Somerset.

The cause was tried before PLATT, B., at the last spring assizes for the county of Somerset.

The land sought to be recovered was a district called Haidwood, which was shown to be within and parcel of the manor of Taunton and Taunton-Deane.(a)

Before the Conquest, and down to the passing of the land-tax redemp-

(a) Formerly called "the manor of Taundene" (*vide post*, p. 474), afterwards "the manor of Taunton and Tawn Dene," i. e. the manor of the town, and of the valley, of the river, Taun or Tone.

tion act, this manor formed part of the possessions of the see of Winchester.(a)

By indenture of bargain and sale, duly sealed and delivered, and intended to be enrolled, and bearing date the 19th of February, 1822, between the Bishop of Winchester, of the first part; Lord Glenbervie and Lord Radstock,—two of the commissioners appointed for the purpose of regulating, directing, approving, and confirming all sales and contracts for sale, which should be made by any bodies politic or corporate, or companies, for the purpose of redeeming any land-tax charged on all or any of the manors, messuages, lands, tenements, or hereditaments belonging to such bodies politic, &c.,—of the second part; Thomas Southwood, of the third *part; and W. Kinglake (the lessor of [457 the plaintiff of the fourth part;—the bishop, in exercise of the powers vested in him by the acts thereinbefore referred to, some or one of them, with the consent, authority, and approbation of the said commissioners, testified, &c., granted, bargained, sold, and conveyed to Southwood and his heirs, All that the manor or lordship of Taunton and Taunton-Deane, in the county of Somerset, and all and every the messuages, barns, stables, dove-houses, yards, gardens, orchards, tofts, lands, tenements, cottages, meadows, pastures, feedings, leasows, woods, underwoods, commons, common of pasture, and wastes, in the said manor or lordship, and in the tithings, hundreds, places, or parishes of Holway, Hull, Poundsford, Staplegrove, Naylesborne, Otterford, and Rimpton, or any of them; and also all and every the quit-rents, rents of assise, rents-seck, rents and services of the free and customary tenants, and all fee-farms, annuities, escheats, reliefs, aids, heriots, fines, amerciements, customs, rents, common fines, courts-leet, and courts-baron, view of frankpledge, and all that to court-leet and to court-baron or view of frankpledge did appertain, goods and chattels waived estrays, day-works of tenants, chattels of felons (felons of themselves and others), fugitives, outlaws, persons attainted or put in exigent, escheats, deodands, estovers and common of estovers, fairs, market-tolls, customs, and all other royalties, jurisdictions, franchises, liberties, privileges, rights, easements, profits, commodities, advantages, emoluments, and heriots whatsoever to the said manor or lordship belonging or anywise appertaining, in as full and ample a manner as they then were, or at any time theretofore had been, held, used, occupied, or enjoyed by the said bishop or any of his predecessors,—saving and excepting certain lands, &c., which were under lease for lives, and mines and minerals, &c., and advowsons; habendum, to Southwood and his heirs, to such uses as *Southwood should, by any deed, [458 &c., appoint; and, in default of appointment, to the use of Kinglake, his heirs and assigns, in trust, for Southwood, his heirs and assigns.

By agreement of 21st August, 1822, between Southwood and Kinglake, Southwood agreed to sell, and Kinglake agreed to purchase, for

(a) Vide 1 Dugd. Monast. Angliæ. ed. 1655, p. 980.

11206*l.* the hundred of Holway (except the lands in the said hundred, in which Southwood had copyhold interest, or freehold in the parish of Angersleigh), the tithing or parish of Otterford, the tithing or district of Taunton castle and Taunton borough, being parts and parcels of the manor of Taunton and Taunton Dean, together with the rents, fines, heriots, and services payable thereout to Southwood, as lord of the said manor, except as before excepted; reserving to Southwood, his heirs and assigns, as lord of the said manor, all patent offices belonging to the said manor, all common or right of soil as lord of the said manor, and the royalty of hunting, &c., and all casual and other profits of all other parts and portions of the said manor, and the inheritance thereof, in fee simple, free from encumbrances.

Southwood, by his will, bearing date 13th May, 1829, after several devises and bequests not affecting the property in question, proceeded as follows:—"And all the rest of my manors, houses, and buildings, advowsons, and all my chattels not before disposed of, I give to my faithful servant Robert Mattock; (a) and I do hereby nominate him my sole executor and residuary legatee."

By indenture of 16th November, 1842, between Mattock and Kinglake, *459] Mattock released to Kinglake all *that the said hundred of Holway, &c. (*ut supra*), habendum to Kinglake, his heirs and assigns. (b)

The defendant claimed, as customary tenant, to be entitled to hold the property as part of the premises included in the following surrender:—

"Monday, 9th December, 1800.—Abraham Bond, late of Thurlbeer, but now of Orchard-Portman, gentleman, doth surrender into the hands of the lord the pasture wood and underwood of Haydwood, containing, by estimation, sixty acres, with the appurtenances, in the tithing of Holway, heretofore of Sir Thomas Ackland, baronet, afterwards of Peregrine Palmer, Francis Newman, and Henry Fownes Luttrell, Esquires, and late of Abraham Bond, deceased, To the use and behoof of John Wheadon of Chard, in the county of Somerset, gentleman, and John Beviss the younger, of Wambrook, in the county of Dorset, gentleman, their heirs and assigns for ever, according to the custom of the manor of Taunton-Deane; To be holden upon the conditions declared in certain articles of agreement therein mentioned. Taken the 9th day of December, 1800."

and in the following fine-paper,—

"3d May, 1840. Dinah Beviss, of Wambrook, in the county of Dorset,

(a) This devise containing no words of inheritance, an arrangement was, in 1831, entered into between Mattock and the heir of Southwood the testator, by which, in consideration of 1500*l.*, the heir released all his right to Mattock; but, as this did not affect the legal estate in the hundred of Holway, which remained throughout in the lessor of the plaintiff, the deed by which the arrangement was effected was not produced.

(b) This instrument did not operate upon the legal estate, which was already in the releasee; and even the equitable interest,—supposing the equitable title to be material,—had been transferred by the agreement of 21st August, 1832.

widow, relict, and heir(a) according to the custom of the manor of Taunton-Deane of John Beviss, *the younger, lately of Wambrook [*460 aforesaid, gentleman, deceased, who was the surviving surrenderee named in four certain surrenders, bearing date the 9th day of December, 1800, and made by Abraham Bond, then of Orchard-Portman, gentleman, of the lands hereinafter described, for (b) *the pasture, wood, and underwood of Haydwood*, containing by estimation sixty acres, with the appurtenances, in the tithing of Holway, heretofore of Abraham Bond, deceased; afterwards of the first-named Abraham Bond, and late of John Wheadon, deceased, and the said John Beviss, deceased; and which premises came into the hands of the lord upon the death of the said John Beviss, To be holden upon the conditions contained in the surrenders hereinbefore referred to. And this entry was made the 30th day of May, A. D. 1840, in the presence of Edwards Beadon and William Upham, tenants of the lord.”(c)

*The land sought to be recovered had, as far back as living [*461 memory went,—one of the witnesses speaking to a period of sixty

(a) In this manor the wife is the customary heir of her husband, to the exclusion of his children, and if she marry again, the second husband may acquire, in fee-simple, the entire customary estate, by the following process:—

“In case a woman seised of any customary lands of inheritance, parcel of the said manor, marry an husband, the same husband ought, and by the custom of, &c., hath used to *fine* with the lord of the said manor, for her and her land, at the old precedent fine of the same land, and thereof to make an entry with the clerk of the castle aforesaid, and to put in pledges at or before the first law-day-court after the said marriage. By virtue of which marriage, entry, and pledges, the husband becomes owner of the same land, and is to be admitted tenant thereunto, to hold the same to him and his heirs for ever, according, &c.”—*Vide* “Ancient Customs of the Manor of Taunton-Deane,” (Tiverton, 1821), No. 20.

(b) i. e. *made fine* for.

(c) In this manor, no formal *admittance* takes place, either of the surrenderee, upon a surrender, or of the heir, upon a descent. There being thus no recorded act of the lord accepting the surrenderee or the heir as a tenant, his tenancy is not *per copiam rotuli*. Though a customary tenant of base tenure, he is not, therefore, strictly speaking, a *copy holder*. His interest, notwithstanding that it is complete and permanent by the custom of the manor, is, in point of form, merely an incipient, incomplete,—an *undeveloped* copyhold. As this peculiar and anomalous species of base tenure has acquired no distinctive appellation, it is known only under the general term of “*customary estate*.”

Another observation arises upon the form of transfer of customary lands in this manor. In this, as in other manors, when the customary tenant makes a surrender, he employs terms sufficient to define the extent of the interest which he means to pass from himself to the surrenderee; but it is no affair of his, nor is it required from him by the surrenderee, that any trammels by which the estate may be bound, or any infirmity, real or nominal, by which it may be affected, should be expressed in the surrender. When, however, the lord comes to regrant, in pursuance of the surrender, the steward takes care that the originally precarious nature of the tenure shall distinctly appear upon the face of the recorded grant,—a precaution formerly of great importance: inasmuch as, if the surrenderee were a villein (of which the very acceptance of a tenure in villenage would afford no small presumption), a copyhold grant, omitting the words “at the will of the lord,” would enure as an enfranchisement. The omission, therefore, of the words “at the will of the lord” in the lord’s grant, would be strong evidence that the grant, though entered on the rolls of the manor, passed a freehold interest,—that it created that which is properly designated a customary *freehold*, and not a customary estate of base tenure. The evidence would appear, indeed, to be conclusive, unless holding *at the will of the lord*, can be considered as involved in the holding *according to the custom of the manor*. But the omission, or, rather, the non-appearance, of such words in a *surrender*,—a transaction to which the lord is neither party nor privy,—leads to no such inference. And see 3 Mann. & Ryl. 335 (a); *ante*, Brown v. Gill, Vol. II. p. 861.

years,—consisted of arable and pasture land forming part of a farm occupied by the tenants of the defendant and her predecessors, who took the timber growing upon the land,(a) exercising the rights of customary tenant of the soil, as well as of the surface. For the lessor of the plaintiff, it was, however, contended, that this was a usurpation upon the rights of the lord. It was shown, that, from the fifteenth century,—the earliest period to which the entries of surrenders and fines were in existence,—until 1745, the parties to alienations of this property, uniformly surrendered "*pasturam bosci et subbosci de Haydwood*," and the new tenants fined "*pro pasturâ bosci et subbosci, de Haydwood*." The last entry in this form was of the 2d of November, 1722, when Mary Dyke of Tetton, in the parish of Kingston, widow, relict and next heir of Thomas Dyke, late of the same place, esquire, her husband, deceased, fined, "*pro* *462] *pastura bosci et subbosci de Haydwood*, *continent. per estimationem, sixty acres cum pertinenciis in decennâ de Holway, quondam Thome Dyke, nuper de Kingston, generosi, defuncti, et nuper Thome Dyke, de Dulverton, generosi, defuncti, et que premissa in manus domini devenerunt post mortem prefati Thome Dyke, nuper viri sui defuncti, Habendum, &c. Et hec intratio facta est secundo die Novembris, A. D. 1724, in presencia Iohannis Bull, gen., et Thome Wills, tenen- cium domini."

The next entry was an entry made after the passing of 4 G. 2, c. 26, whereby, *inter alia*, "all proceedings in courts-baron, courts-leet, and customary-courts, and all copies thereof," were directed to be "in the English language only."(a) This entry (of 5th April, 1745) runs thus:—"Dame Elizabeth, now the wife of Sir Thomas Acland, of Petherton Parke, in the county of Somerset, Bart., lately called Elizabeth Dyke, only daughter and next heir of Mary Dyke, widow, deceased, who was the relict and next heir of Thomas Dyke, late of Tetton, Esquire, deceased, with her lands, to wit, for *the pasture wood and underwood* of Haydwood, containing by estimation sixty acres, with the appurtenances, in the tything of Hollway, heretofore of Thomas Dyke, of Tetton, esquire, deceased, and late of Mary Dyke, widow, deceased (late father and mother of the said dame Elizabeth), to be had, &c. And this entry was made the 5th day of April, 1745."(c)

*463] *The subsequent remainders and fine-papers were in the same form as that of 5th April, 1745.

In this manor, the timber belongs to the customary tenants of the soil

(a) *Vide post*, 463.

(b) By the 2d section of that statute, it is enacted, "that mistranslation, variation in form by reason of translation, misspelling, or mistake in clerkship, in pleadings or proceedings begun or to be begun before the said twenty-fifth day of March, 1733, being part in Latin and part in English, shall be no error, nor make void any proceedings by reason thereof; but that all manner of mistranslation, errors in form, misspellings, mistakes in clerkship, may at any time be amended whether on paper or on record, or otherwise."

(c) On the following day, 6th April, 1745, there is a similar entry by Sir Thomas Acland, for Dame Elizabeth, his wife.

on which it grows; and, in order to show that the ancient tenants of the "pastura bosci et subbosci de Haydwood" had not the soil itself, but had merely the herbage of the wood, the pipe-rolls of the manor were produced from the bishop's exchequer of the manor kept in the castle of Taunton, in the custody of the clerk of the castle of Taunton,—a patent officer appointed for life by the lord of the manor. These pipe-rolls(a) contained the annual accounts of the reeves of six of the seven hundreds into which the manor is divided, the account of each reeve being entered upon a separate roll.(b) In some of these accounts, the reeves debited themselves with the amount of moneys received by them upon sale of the timber brought from the lord's woods, and, amongst others, for moneys received from the sale of *timber and underwood from Haydwood*.

The plaintiff also proposed to read entries from these rolls, of sums for which the reeve of the hundred of Hollway took credit, as paid to the woodwards of the lord's woods, for which service each of the four woodwards,—*of whom the woodward of Haydwood* was one,—received an annual salary of 1s. 1d. This was objected to, on the ground that it did not appear, upon the face of the particular entries, or on any other part of the account, that the reeve acknowledged the receipt of *the specific sum for which, by the entry, he claimed a credit. [*464 To this it was answered, that, as the debits and credits formed but one account, every amount for which the reeve gave credit, went in extinction of the items contained on the credit side, and that it was immaterial whether an accountant acknowledged that his claim had been satisfied by payment or by a set-off. The evidence was rejected.

The following extract was produced by the plaintiff, and read in evidence, from "A survey of the Castle of Taunton, and the manor or lordship of Taunton and Taunton-Deane, with the borough of Taunton there, examined before Hugh Paulett, Knt., and others, 18 September, 14 Eliz., by virtue of a commission to them directed, and upon the oaths of several juries for the several hundreds and districts. A. D. 1572.

"Custom(arii)(c) tenentes. Hundred de Holway,

"Idem Robertus Hill tenet medi(etat)em pasture de Haidwood, h(ab)endum sibi et heredibus, suis, secundum consuet(udinem) maner(ii) p(re)d(icti), redd(endo) inde per annum, ad ter(m)i(nos) supradictos, quinq(ue) solid(os).

"Idem Robertus Hill tenet al(iam) medi(etat)em pasture bosci et sub-

(a) The pipe-rolls of the episcopal exchequer of Taunton were probably so called from a similarity of character to the pipe-rolls of the royal exchequer. It did not appear that the Taunton pipe-rolls had been, at any time, conveyed to their repository, as at Westminster, through a *pipe*. 3 Mann. & R. 348 (a).

(b) The accounts for the district of Taunton Castle were rendered, not by a reeve, but by a *receiver*, to whom the reeves of the hundred accounted. The accounts of Taunton Borough were rendered by *two reeves* jointly. Those of Taunton Liberty were rendered by a *bailiff*.

(c) The letters within the parentheses are inserted from conjecture, to complete the words. These, and the punctuation, are supplied by one of the editors. The blanks left are so in the original. Words illegible, or not deciphered, are supplied by asterisks.

bosci de Haidwood, nuper Joh(ann)is Soper, h(ab)endum sibi et heredibus suis, secundum consuet(udinem) maner(ii) p(re)d(icti), redd(endo) inde per annum, ad ter(minos) supra(dictos), quinq(ue) solid(os)."(a)

*465] *One of the pipe-rolls rejected contained the account of the reeve of the hundred of Holway, for the year 1520-1521, and was as follows:—

"*Holewey.*] Comp(ut)us Rob(er)ti Webbe, p(re)p(ositi), ib(ide)m, a festo S(an)c(t)i Mich(ael)is Arch(angel)i, anno r(egni) r(egis) H(enrici) VIII. xii^o, usque idem festum S(an)c(t)i Mich(ael)is Arch(angel)i, ex tunc sequente, anno r(egni) r(egis) s(u)p(ra)d(icti), xiii^o, et anno tr(anslation)i s(d)omi)ni Ric(ard)i Foxe, Winton. epi(scopi), xx."

After this heading come the several heads of charge, i. e. the *debit* side of the reeve's account with the lord.

"*Arr(eragia).* Nulla.

"*Redd(it)us ass(ise).*] Set r(espondet) de xxx^s xvi^s v^d ob(olo) q(uadr)ante et iii^{ia} p(ar)te q(uadr)antis de toto redd(it)u ass(ise) ad term(inum) Nat(al)is D(omi)ni: Et de xxx^s xvi^s v^d ob(ole) quad(rante) et iii^{ia} p(ar)te q(uadr)antis de toto redd(it)u ass(ise) ad term(inum) Pasch(e): Et de xxx^s xvi^s v^d ob(olo) q(uadr)ante et iii^{ia} p(ar)te q(uadr)antis de toto redd(it)u ass(ise) ad term(inum) Nat(al)is S(an)c(t)i Joh(ann)is Bapt(ist)e: Et de xxx^s xvi^s v^d ob(olo) q(uadr)ante et iii^{ia} p(ar)te q(uadr)antis de toto redd(it)u ass(ise) ad term(inum) S(an)c(t)i Mich(ael)is Arch(angel)i: Et de ii^s iv^d de incr(emento) redd(it)us, pro quadam p(ar)cella terre de vasto solo d(omi)ni t(ra)dit(a) div(er)sis tenentibus d(omi)ni; ut patet in libris p(re)cedentibus. "Summa, cxxiii^s viii^s iii^d q(uadr)ans."(b)

"*Consuetud(ines).*] Et de xix^s ix^d ob(olo) de pannagio porcorum, hoggett(orum), et porcellorum, ad festum S(an)c(t)i Martini hoc anno: Et de xxiii^s ix^d de c(er)ta consuet(udine) de hundredpeny, ad festum *466] *Nat(al)is D(omi)ni: Et de xvii^s vi^d de c(er)ta consuet(udine) de Hockdey(c) ad idem festum: Et de xl sol(idis) de c(er)ta consuet(udine) de Hokedayswyte. "Summa, ci^s ob(olus)."(d)

"*Annual(es) recogn(itiones).*(e)] Nulle.

"*Vendicio h(er)ietto(rum).*] Set r(espondet) de vi^s viii^d rec(eptis) de p(re)cio unius equi p(ro)venien(tis) de h(er)ietto Joh(ann)is Robins, jun., hoc anno: Et de xx^s receptis de p(re)cio unius equi p(ro)venien(tis)

(a) It appears from this document that the tenement was then held in distinct moieties, though both moieties were vested in the same person. It is also observable that the description is less full in the statement of the first moiety than in that of the second. The surrender may have been really more full in the one case than in the other, or the transcriber may have abbreviated in one case and not in the other.

(b) 123l. 8s. 3½d.

(c) Madox. Formul. Anglic. p. 225.

(d) 5l. 1s. 0½d.

(e) Under the head of Annual Recognitions, the reeve of Poundesforde charges himself: "Et de viii^d receptis de annuali recogn(itione) Joh(ann)is Sevenoke, ut possit t.ra.here moram extra dominium d(omi)ni quamdiu d(omi)no placuerit, et venerit ad duos turnos."

Under this head (Annual Recogn.) the reeve of Nallesborne charges himself: "Et de vi^s viii^d de Will(ielm)o More, nat(ivo) d(omi)ni, de annual(i) recog(icione) sua, ut possit manere apud Enmer, et ad faciend(um) sect(am) ad ii turn(os), et manere nat(ivum) d(omi)ni ut prius, pplm Thome Blancheflore."

de h(er)ietto (a) Joh(ann)is Pope, hoc anno : Et de xs. rec(eptis) de p(re)-
cio unius equi p(ro)venien(tis) de h(er)ietto Johanne Coke, hoc anno :
Et de xx^a rec(eptis) de p(re)cio unius bovis p(ro)venien(tis) de h(er)ietto
Will(ielm)i Whithorne, hoc anno : Et de viii^a rec(eptis) de p(re)cio i equi
p(ro)venien(tis) de h(er)ietto Rog(er)i Ede, hoc a(nn)o : Et de xx^a re-
c(eptis) de p(re)cio unius bovis p(ro)venien(tis) de h(er)ietto Joh(ann)is
Rousewell, hoc anno : Et de xvi^a viii^a rec(eptis) de p(re)cio unius vacce
p(ro)venien(tis) de h(er)ietto Joh(ann)is Pilswell, hoc anno : Et de xi^a re-
c(eptis) de *h(er)ietto Joh(ann)is Palmer, pro ii cot(agiis), hoc an- [*467
no : Et de xii^a rec(eptis) de h(er)ietto Nich(ola)i Gretanner, pro
duobus cot(agiis), hoc anno : Et de vi^a rec(eptis) de h(er)ietto Joh(ann)is
Fisher, pro i cot(agio), hoc a(nn)o : Et de iii^a vi^a rec(eptis) de h(er)ietto
Johanne Grynfelde, pro ix cot(agiis), hoc anno.

“Summa, cviii^a iiiii^a” (b)

“*Vendicio bosci.*] Et de xvi^a viii^a rec(eptis) de Nich(ola)o Lacy, pro
quingquaginta plaustrat(is) subbosci sibi vendit(is) in Haidwode, p(re)c(io)
plaustrat(e) iiiii^a, hoc anno.

“Summa, xvi^a viii^a” (c)

“*Vendicio pastur(e).*] Et de vi^a rec(eptis) de pastura itineris quod
ducit a Taunton usque Shordyche.

“Summa, vi^a” (d)

“*Firme.*] Et de vi^a de firma pasture de Tapingwer,(e) ad quatuor
anni term(in)os : Et de viii^a, de uno cot(agio) p(er)tinente ad dictam wer.

in longo : Et de viii^a de firma unius acre terre undique inclus(e)
juxta Redemore, et dimiss(e) Joh(ann)i Lobb(e) ad term(inum) vite sue :
Et de xvi^a viii^a de firma pasture et subbosci novi p(ra)ti de Corffe, ex di-
miss. Walt(er)o Eshe et Thome Sachell ; tamen reddere solebat per
annum xxiii^a iiiii^a de firma pasture et pessone in Hintewood

et Hintemedede modo qu. pro salvacione de la apryng ib(ide)m. Set r(e)-
spondet de aliquibus denar(iis) percept(is) de agistamento averi(orum),
hoc anno pro copitis ib(ide)m salvand(is).

“Summa, xxiv^a” (g)

“*Vendicio op(er)um.*] Et de xxxiv^{us} xiv^a xi^a obolo *di(midio) [*468
qu(adrantis) de op(er)ibus vendit(is) ; ut patet in anno xx^a H(en)-
rici) VI.

“Summa xxxiv^a xi^a ob(olus),
dimidium qu(adrantis).” (h)

“*Fines et maritag(ia).*(i)] Et de xiii^a iiiii^a de Agnet(e) nuper ux(ore)
Henr(ici) Weyland, pro viii^a acr(is) terre de ov(er)land vocat(is) Feltham,

(a) The heriot due from the customary tenants of bond-lands in this manor, is, a heriot custom,
— a heriot due in respect of *tenure*, i. e. in respect of the relation of *tenant*, and not a heriot-ser-
vice, or heriot due in respect of the *tenement*. Vide Manning's Exch. Pract. 2d ed. p. 341 ; 5
M. & R. 417. Heriot-service, therefore, is extinguished by unity of possession ; *secus*, of heriot-
custom. Vide M. 14 H. 4, fo. 5.

(b) 5l. 8s. 4d.

(c) 16s. 8d.

(d) 6d.

(e) Cal. Rot. Parl. 212 a.

(g) 1l. 4s.

(h) 1l. 14s. 11½d. ½.

(i) Under the head of Fines and Marriages, the reeve of the hundred of Stapulgrove charges
himself : “ Et de xx^a de Joh(ann)e Corner, pro eo quod Joh(ann)es Hinbury concessit Alicie ux-
ori Joh(ann)is Corner, post mortem dicti Joh(ann)is Corner quoddam corrod(ium) extens de i

ii acr(is) terre de ov(er)land apud Well, in dec(enna) de Holeway, que nuper fuerunt p(re)dicti Henr(ici) nuper viri sui, retinend(is): Et de iii^a de eadem Agnet(e), pro i p(ar)cella terre nuper Henr(ici) Weyland, vocat(a) William's Mede, in dec(enna) de Holewey, et qu(am) p(re)dictus Henri(cus) d(omi)ni(a) tenuit in socag(io), h(ab)end(a): Et de viii^a vi^a de Will(ielm)o More, cappell(ano), pro iii^a acris terre de ov(er)lond voc(ate) Pirlond, in dec(enna) de Holøwey, nup(er) Walt(eri) Stele, capell(ani), et postea Joh(ann)is North, capell(ani), et quod remanet in manus(b) d(omi)ni p(ro) def(ectu) finient(is), (c) h(ab)end(is): Et liv^a vi^a de Henr(ico) Skynner, pro i mes(uagio) et i ferlingo terre nat(ive)(d) i acr(a) p(ra)ti de ov(er)lond *469] in Haydemede, et i acr(a) terre de ov(er)lond in Blakedon, in dec(enna) de Russheton, ex r(eddicione) Joh(ann)is Cobbe, h(ab)end(is): Et de xiii^a de Ric(ard)o Tedbury, pro di(midio) acr(e) p(a)ti de ov(er)lond juxta Wydemedebrigge, in dec(enna) de Holewey, ex r(eddicione) Will(ielm)i Wey, generosi: Et de xii^a iii^a de Thoma Hil, pro i cot(agio) cum curt(ilagio) et suis p(er)tin(entibus), contin(ente) vi dayn(e) terre de ov(er)lond juxta Redhill, in dec(enna) de Ex(tra)port(am), nup(er) Joh(ann)is Ad(a)ms, de Estyate, ex r(eddicione) Henr(ici) Wilson, de Apulby, h(ab)end(is): Et de xx^a de Alex(andr)o Togswill, pro i dayn(e) terre de ov(er)lond in boreali p(ar)te i cl(aus)i, voc(ati) Tauntfeld, in dec(enna) de Holewey, ex r(eddicione) Thome Togswill, attrahend(o) sibi residuum terre Isabelle Milbone, videl(ice)t, i (h)orreum et iii^a acr(as) terre de ov(er)lond in Tauntfeld, et vi acr(as) p(ra)ti de ov(er)lond, voc-*470] (atas) Medelond, in dec(enna) p(re)dict(a), *cum acciderit, h(ab)end(o): Et de x^a ii^a de Will(ielm)o Skoryer, jun., pro i cot(agio)

mesuag(io) et di(midio) virg(ate) terre nat(ive) in dec(enna) de Pirlond, videl(ice)t, asiamentum infra aulam, et liber(um) introitum et exitum ad ignem et aquam, et i cam(er)am in occident(ali) p(ar)te) aule et t(er)ci(am garb(am) cujus(ibe t gen(er)is g.ra)nor(um): etiam p(ar)tem pom(orum) super p(re)miss(is) crescen(tium)."

(a) Sic.

(b) Sic.

(c) Vide *supra*, 459 (b).

(d) Terra nativa (bond-land) consists of customary tenements upon which there are or have been ancient dwellings. This description of tenement (as the name imports) is held in villenage. This character of villenage, however, appears to apply to the other class of customary tenements denominated overland (overland), which consists of customary tenements whereon there was anciently no dwelling. (Customs, No. 1.) The present difference between the two classes of tenements, is, that the tenants of bond-lands are liable to heriots, and are bound to do suit at the lord's courts, from both of which the tenants of overland are exempt (Customs, No. 1, 8, 27); and that the customary tenants of lands of overland have power to divide and parcel out their tenements at their pleasure, subject to an equal apportionment of fines and rents. (Customs, No. 6.) These distinctions appear to be explained by the ancient state of the two classes of customary tenements.

(e) A *dayne* appears to be a distinct portion of a tenement. Thus, in customs, No. 8, we find: "The surrender of the said customary lands, by the custom of the said manor, are and have been called by divers denominations, viz. some absolute surrenders, some conditional or mortgage surrenders, and some *dayne* surrenders. * * A *dayne* surrender, is, where a customary tenant doth surrender a *parcel* of his customary lands, be it much or little, bond-land, or overland, to any other person, by the name of a *dayne*, to draw to the same person and his heirs the residue of the same lands and tenements, when it shall happen, after the death of the surrenderor. In this case, he to whom the same surrender is made, by the custom of the said manor, hath and ought to have the *dayne* presently in possession, unless it be otherwise agreed; to have and to hold the said *dayne* to him and his heirs for ever, according," &c.

cum curt(ilagio), cont(i)nent(e) ii dayn(a) terre, in dec(enna) de Ex(tra)-port(am), nup(er) Joh(ann)is Haukins, et is cot(agi)o cum cur(tilagio), in dec(enna) de Ex(tra)port(am), nup(er) Rob(er)ti et Anne Weston, ex r(eddicione) Willi(elmi) Skoryer, p(at)ris sui, h(ab)end(is): Et de xi^a de Joh(anne) Sandon, fil(io) Thome Sandon, pro i mes(uagio) et i ferling(o) terre nat(ive), in dec(enna) de Russheton, et pastura de ii ani(malibus in Russheton agro, in dec(enna) de Russheton, ex r(eddicione) d(i)ct(i) Thome Sandon h(ab)end(o): Et unde idem Joh(ann)es prius finivit(b) pro i dayn(a) terre nat(ive) in Gravellond, in dec(enna) de Russheton, ex r(eddicione) Rob(er)ti Gardiner, attrahend(o) sibi residuum ten(ementi) et terre d(i)ct(i) Thome Sandon, cum acciderit, h(ab)end(o): Et de vi^a viii^a de Johanna nup(er) ux(ore) Joh(ann)is Slye, pro i acr(a) p(ra)ti in Pitmede, in dec(enna) de Holewey, que nup(er) fuit p(redi)c(t)i Joh(ann)is, nup(er) viri sui, retinend(a): Et de xx^a de Thoma fil(io) Nich(ola)i Ley, pro i dayn(a) terre in fine gardini, in dec(enna) de Holewey, ex r(eddicione) d(i)ct(i) Nich(ola)i, attrahend(o) sibi residuum ten(ementi) et terre d(i)ct(i), Nich(ola)i, videl(ice)t, ii cot(agia) et viii acr(as) terre de ov(er)-lond, in dec(enna) p(re)dict(a), cum acciderit, h(ab)end(o): Et de xx^a iii^a de Ric(ard)o Gardiner, pro i mes(uagio) et i ferling(o) terre nat(ive), et quinq(ue) acr(is) terre nat(ive), i cot(agi)o cum curt(ilagio), cont(inente) ii dayn(a) terre, et i acr(am) p(ra)ti de ov(er)lond, in Pitmede, in dec(enna) de Stoke, ex r(eddicione) Petri Sacyn, h(ab)end(is): Et de vi^a x^a de Joh(ann)e Sandon, pro i mes(uagio) et quin(que) acr(is) terre nat(ive), et pastura ad ii an(imali)a, in Russheton More, ex r(eddicione) Willi(elm)i Colake, al(ia)s Gander, h(ab)end(is): Et de xxx^a *ii^a de Thoma Marler, pro i mes(uagio) et quinque acr(is) terre nat(ive), et pastura [*471 ad ii ani(mali)a, in Russheton More, et ii acr(is) p(ra)ti de ov(er)lond, in Gosehey, in dec(enna) de Russheton, ex r(eddicione) Johannis Marler, h(ab)end(is): Et de xx^a de Thoma Marler, pro eo q(uo)d concessit prefate Johanne, quodd(a)m corrod(iu)m(c) exiens de i mes(uagio) et quinque

(a) Vide *supra*, 469 (a).

(b) *Supra*, 459 (b).

(c) "There is, and always hath been, within the said manor another kind of surrender conditional of customary estates of inheritance, as, namely, where there is a particular interest reserved to the surrenderor, or to his wife or any other person, for life or lives, or any number of years, either of the whole lands, or of any rent or profit to be issuing out of the same lands so surrendered; in which case the particular interest, rent, or profit so reserved upon the same surrender, is, and always hath been, called a customary *corody*; into which corody the party to whom the same corody hath been limited, hath used, by the custom of the said manor, to enter and enjoy the same accordingly, to his own private use." Customs, No. 10.

"If an abbot of his own head grants to A. a corody, without more, *nil operatur*, unless he says also,—to wit, 12 *cast* of bread and 12 *bagunkills* of beer per week, which is a good grant of a right to have these things. This, however, is not a *corody* but a *profit*; for, every corody rests upon foundership (of the religious house in which the corody is to be granted)." T. 22 E. 4, fo. 18, pl. 43, per HUSSEY, C. J., and FAIRFAX, J. It seems doubtful whether, in the absence of express reservation, a right to grant, or rather a right to require an abbot to grant or furnish, a corody, accrues to a common person being a founder, or whether such right is matter of prerogative, and is confined to cases where the religious house is of royal foundation: Abbot of St. Oswald's case, T. 44 E. 3, fo. 3, pl. 24, pl. 33, reported also, 50 Lib. Ass. fo. 325, pl. 6; M. 1 E. 4, fo. 10, pl. 20; M. 21 E. 4, fo. 81, pl. 34 (upon a demurrer in Chancery, argued in the Exchequer Chamber, on the return to a commission upon a petition of right brought by abbot of Leicester,

acr(is) terre nat(ive), et ii acr(is) p(r)a'ti de ov(er)lond, durante vita ip(s)ius Johanne, videl(ice)t, aisiamen(um) et lib(eru)m introitum et exitum ad ignem et aq(uam), ac i cam(er)am, necnon victum et vestitum sufficient(es), et iii^a annuatim solvend(os): Et si dict(us) vict(us) et vestit(us) *non ei placuerit, q(uo)d ex tunc p(re)dict(us) Thomas solvet p(re)-
 *472] fate Johanne annuatim xxxiii^a iiiii^a ad quatuor ann(i) term(in)os solvend(os): Et si contingat, &c., q(uo)d extunc, &c.: Et de v^a iiiii^a de Ric(ard)o Godde, pro i cot(agio) cont(inente) iii dayn terre, (a) in dec(enna) de Ex(tra)port(am), ex r(eddicione) Johanne Scorwey, h(ab)end(o): Et de xii^a de Thoma Sandon pro ii acr(is) et di(midio) terre de ov(er)lond, in Blakedon, in dec(enna) de Russheton, ex r(eddicione) Alicie Fisher, h(ab)end(o): Et de ii^a vi^a de Ric(ard)o Abcombe pro i acr(a) terre nat(ive) voc(ata) Highway, in dec(enna) de Stoke, ex r(eddicione) Nich(ola)i Abcombe, attrahend(o) sibi residuum ten(ementi) et terr(e) dicti Nich(ola)i videl(ice)t, unum mes(uagium) et quinq(ue) acr(as) terre nat(ive), in dec(enna) p(re)dict(a), cum acciderit, h(ab)end(o); ita q(uo)d d(omi)nus h(ab)ebit no(m)i(n)e h(er)iet(t)i i jument(um) p(re)c(ii) viii^a vi^a: Et de xvii^a vi^a de Thoma Hill, pro i mes(uagio) et quinq(ue) acr(is) terre nat(ive), et ii acr(is) terre et p(r)a'ti de ov(er)lond, in dec(enna) de Holewey, ex r(eddicione) Joh(ann)is Marshall, h(ab)end(is); et p(re)dictus Thomas manucepit pro fine(b) Joh(ann)is Marshall, et exon(er)abit Joh(ann)em ab eod(em), &c.: Et de vi^a ii^a de Johanna, nup(er) ux(ore) Joh(ann)is Blakeslond, pro i mes(uagio) et quinq(ue) acr(is) terre nat(ive), et iii dayn(a) terre voc(ate) Heandole, in dec(enna) de Holewey, que nuper fuerunt dicti Joh(ann)is nuper viri pro sui, retinend(is): Et de vii^a de Ric(ard)o Heyward, i cot(agio) cum curt(ilagio) cont(inente) dayn(a) terre de ov(er)lond, in dec(enna) de Ex(tra)port(am), nuper Joh(ann)is Dier, ex r(eddicione) Joh(ann)is Adams, de Estayte, h(ab)end(o): Et de xxxiii^a viii^a de Will(ielm)o Rocheman, pro Thomasia Redy, cum terra sua, videl(ice)t, i mes(uagio) et i ferling(o) terre nat(ive) et pastura ad ii ani(mali)a in Russheton More, in
 *473] *dec(enna) de Russheton, h(ab)end(is): Et de xx^a de Rob(er)to Atwill, laborer, pro i cot(agio), cum suis pertin(entiis), in dec(enna) de Ex(tra)port(am), nuper Johanne Combe, ex r(eddicione) Henr(c)i Dyte, h(ab)end(o): Et de iii^a iv^a de Will(ielm)o Jenyn, pro i acr(a) terre nat(ive), voc(ata) Litelmede, juxta aquam, in dec(enna) de Wodelond, ex r(eddicione) Will(ielm)i Fairshere, attrahend(o) sibi residuum ten(ementi) et terre d(i)c(t)i Will(ielm)i, Fairshere, videl(ice)t, i mes(uagium) et di(midium) virg(ate) terre nat(ive) in eadem dec(enna), cum acciderit, h(ab)end(is); ita q(uo)d d(omi)n(us) h(ab)ebit no(m)i(n)e h(er)iet(t)i i vaccam p(re)ci(i) xiv^a, si, &c.: Et de ii^a de Will(ielm)o Jenyn, pro eo q(uo)d concessit Isabelle ux(ori) Will(ielm)i Fairshere, quodd(a)m corrod(ium) exiens de i mes(uagio) et di(midio) virg(ate) terre nat(ive), in dec(enna)

praying to be relieved of a corody); Longo Quinto, fo. 118; Bro. Abr. *Corodie*, pl. 16. And see F. N. B. tit. *Prohibition*.

(a) *Vide supra*, 469 (a).

(b) *Vide supra*, 459 (b).

de Wodelond, videl(ice)t, lib(eru)m introitum et exitum ad ignem et aquam, unam cam(er)am voc(atam) le ynner chamber, et i solar(iu)m, et ii plaustrat(as) focal(is), necnon xxvi^a viii^a annuatim solvend(os) ad quatuor anni t(er)mi(n)os, fructus ii arbor(um) voc(atorum) appultrees, et fructus i arbor(is) * * *, h(ab)end(um) et tenend(um) corrod(iu)m p(re)dictum p(re)fate Isabelle ad term(inu)m vite sue, si ip(s)a Isabella ip(su)m Will(ielmu)m supervixerit; et si contingat dictum corrod(iu)m aretro fore, in p(ar)te vel in toto, ex tunc &c. : Et de xiii^a iv^a de Joh(ann)e Soper, jun., pro eo q(uo)d d(omi)n(u)s concessit ei medieta(te)m firme pasture, pessone,(a) et subbosci, novi p(ar)ci de Corffe, in dec(en)na de Stoke, h(ab)end(um) sibi secundum consuet(udinem) manerii de Taunton (b), immediate post mortem Walt(er)i White et Will(ielm)i Sachell, qui tenent p(re)dict(am) firm(am) ad term(inu)m vite eorund(em), et alterius eorum diutius viven(tis), reddend(o) inde annuatim d(omi)no ep(iscop)o et successoribus suis, cum *acciderit, viii^a iv^a ad iii^a anni term(inos) [*474 in p(re)dicto manerio de Taundene(c) usuales, omnes quercos, fraxinos, et swartrees (d) infra dictam firmam crescen(tes) et nutriend(os), d(omi)no ep(iscop)o et success(oribus) suis omnino except. et reservat. absq(ue) aliquo alio fine per p(re)dictum Joh(ann)em Soper post mortem dict(orum) Walt(er)i et Will(ielm)i redd(end)o, sive faciendo, durante vita d(i)c(t)i Joh(ann)is Soper, h(ab)end(o) : Et de xiii^a iv^a de Rob(er)to Hille, pro eo q(uo)d d(omi)nus concessit ei alteram medi(et)at(em) firme pasture, pessone,(e) subbosci novi p(ar)ci de Corffe jacent(is) in dec(en)na de Stoke, h(ab)end(um) sibi secundum consuetud(inem) man(er)ii de Taundene(c) immediate post mortem Walt(er)i White et Will(ielm)i Sachell, qui tenent p(re)dictam firmam pro term(ino) vite eorum et alterius eorum diutius viventis, redd(end)o inde annuatim d(omi)no ep(iscop)o et successoribus suis, cum acciderit, viii^a iii^a iii^a anni term(inos) in p(re)dicto man(er)io de Taundene(c) usuales, omnes quercos, fraxinos, et swartrees (d) super p(re)dict(am) firmam crescen(tes) et nutriend(os), d(omi)no ep(iscop)o et success(oribus) suis omnino except. et reservat. absq(ue) aliquo alio fine per p(re)dict(um) Rob(er)tum Hille post mortem p(re)dict(orum) Walt(er)i et Will(ielm)i redd(end)o, sive faciend(o), durante vita dicti Rob(er)ti : Et de v^a de Henrico Willes, pro i roda terre nat(ive) in Wyndikes, ex r(eddicione) Lucie Milward, attr(ah)end(a) sibi resid(uum) tenementi et terre dicte Lucie, videl(ice)t, i mes(uagium) et di(midium) virgate terre nat(ive), v acras p(ra)ti, vocat(as) Somerlese alias Meedlond, in dec(en)na de Galmyngton, p(re)dicto mes(uagio) annex(as), xi acras p(ra)ti de ov(er)lond in Uncar., iii acras *p(ra)ti vocat(as) Chilmerysmede, et i acram ibid(em), nuper Jo- h(ann)is Billyng, in dec(en)na p(re)dicta, cum acciderit, h(ab)end- [*475

(a) *Pastio porcorum in silvis* (Pannage). 1 Monastic. Anglic. p. 594.

(b) *Vide infra*, 474 (a).

(c) Here, the manor bears different names in the same sentence. *Vide supra*, p. 473; *vide etiam, supra*, p. 456 (a).

(d) *Quare* the meaning of this word.

(e) *Vide supra*, (a).

(iis); ta quod d(omi)nus h(ab)ebit, no(m)ine h(er)ietti, i bovem p(re)ci(i) xxviⁱ viii^d, si, &c.: Et de x^e de Margareta Taverner, pro ii cotag(iis) cum curtilag(iis) continen(tibus) . dayn terre, in dec(enna) de Ex(tra)port(am). nup(er) Joh(annis) Taverner, quondam viri sui, retinend(o): Et de x^e de Rob(er)to Hille, pro ii cot(agiss) cum curtilag(iis), continent(ibus) dayn terre nat(ive), in dec(enna) de Ex(tra)port(am), ex r(eddicione) Margerie Taverner, h(ab)end(o): Et de ii^e de Joh(ann)e Kene, pro di(midio) acre terre na(tive) in Dustlond, in australi parte ejusdem, in dec(enna) de Stoke, ex r(eddicione) Stefani Kene, patris sui, attrahend(o) sibi residuum tenementi et terre dicti Stefani, videl(ice)t, i mes(uagium) et di(midium) virgate terre nat(ive) in dec(enna) p(re)dicta, acras p(ra)ti de ov(er)lond in Widemed, et acras p(ra)ti de overlond in Pitmede, in de(cenna) de Holewey, cum acciderit, h(abe)nd(o); ita quod d(omi)nus habebit, no(min)e h(er)ietti, i vaccam p(re)cii x^e iv^d, si, &c.: Et de xx^e iv^d de Joh(ann)e Wytherton, alias Cardemaker, pro i cotag(io), cum suis pertinent(iis), in dec(enna) de Ex(tra)port(am), ex r(eddicione) Joh(ann)is Fyssher, h(ab)end(o): Et de xii^d de Rob(er)to More, pro i acro p(ra)ti de ov(er)lond in Hardemed, nuper in tenura Will(ielm)i Goly, ex r(eddicione) Joh(ann)is Coton, h(ab)end(o): Et de xx^d de Thoma Sandon, pro eo q(uo)d Joh(ann)es Sandon concessit p(re)fato Thome q(uo)dd(a)m corrod(iu)m exiens de i mes(uagio) et i ferling(o) terre na(tive), in dec(enna) de Russheton, videl(ice)t, aisiamantum infra aulam, lib(er)um introitum et exitum ad ignem et aquam, ac omnia (sic) domos et cam(er)as infradieti mes(uagii) sibi sep(ar)ul(ite)r omni tempore anni, et i acram terre voc(atam) le Cakeside; *476] h(ab)end(um) et tenend(um) corrod(iu)m p(re)dict(um) *p(re)fato Thome, ad term(inum) vite sue, absq(ue) aliquo inde redd(end)o, ad quorumq(ue) manus dicte mes(uagium) et terre in posterum devenierint, h(ab)end(o): Et de iv^e x^e de Johanna, nup(er) uxore Will(ielmi) Whittehorne, pro i mes(uagio) et di(midio) virgate terre nat(ive), ac pastura ad iiiⁱo a(n)i(m)alia in Russheton More, in dec(enna) de Russheton, iiiⁱo acris terre de ov(er)lond, in Blakedon, et ii acris p(ra)ti de ov(er)lond, in Hardemed, in dec(enna) p(re)dicta, que nup(er) fuerunt p(re)dicti Will(ielm)i, nu(per) viri sui, retinend(is): Et de iii^e iv^d de Cecilia Selwode, eo quod dat d(omi)no de fine pro licencia dimittendi(a) ad firmam, i mes(uagium), i toftum, et ii ferling(os) terre nat(ive), et i acram terre de ov(er)lond apud Le Hayne, in dec(enna) de Stoke, in hundredo de Holway, cuidam Will(ielm)o Hakeshall, h(ab)end(um) et tenend(um) mes(uagium), toftum, et terram p(re)dict(am) p(re)fato Will(ielm)o, a festo S(anc)ti Mich(ael)is Arch(angel)i proxime futuro usque ad finem term(ini) duodecim annorum ex tunc proxime sequent(ium) et plenarie complend(orum), redd(end)o d(om)ino ep(iscopo) annuatim durante term(ino) p(re)dicto, redd(it)us p(re)dict(orum) mes(uagii), tofti, et terre p(re)dicte, debit(os) et consuet(os): Et de xx^e vi^d recept(is) de d(omi)na Johanna Grynfeld, vidua, pro ii

cot(agiis) cum curt(ilagiis) et suis pert(inentiis), in dec(enna) de Ex(tra)-port(am), ex r(eddicionē) Thome Spyryng, h(ab)end(is).

“Summa, xxiii^a xvii^a iv^a”(a)

“*Perquis(ita) curie.*”(b) Et de viii^a vii^a de perquis(itis) turni S(anc)ti Martini, hoc anno: Et de x^a x^a de perquis(itis) turni de Hockdey, hoc anno: Et de lxxii^a xi^a de perquis(itis) omnium pernearum(c) cur(ie), hoc anno, cum xviii^a x^a de fine custum(ariorum) *tenenc(ium) pro eorum secta, de tribus septiman(is) in tres, relax(anda)(d); xii^a x^a extrahu- [*477 ris curie; xii^a iii^a de aliis p(er)quis(itis).(e) “Summa, iiiii^a xi^a iii^a(g)

“Summa tot(alis) receptum, iiiixx^a ii^a iii^a q(uadrans).”(h)

Then follow the several heads and items of discharge, i. e. the *credit* side of the reeve's account with the lord:—

“*Acquiet(ancie) redd(it)us et op(er)um.*” Idem comput(at) in acquiet(ancia) redd(it)us et op(er)um unius budelli per annum, p(ro)ut allo(catur) in quamplurib(us) comput(is) p(re)cedent(ibus), iiiii^a x^a: Et in acquiet(ancia) op(er)um p(re)pos(iti) ib(ide)m per annum, causa off(ic)ii sui exercend(i), p(ro)ut allo(catur) in diversis comput(is) p(re)cedentibus, iiiii^a iii^a: Et in acquiet(ancia) unius budelli de wodlond, UNIVS WOD(WARDI) DE HAIDE-WODE, unius wodward(i) de Knolle Wode, videl(ice)t quol(ibe)t eorum ii^a ob(olus) per annum, causa offic(iorum) su(orum) exercend(orum), p(ro)ut allo(catur) in diversis comput(is) p(re)cedentibus, vi^a i^a ob(olus): Et in acquiet(ancia) op(er)um diversorum custom(ariorum) op(er)ancium dayn circa nettiam. mol(endi)norum castri et alibi infra do(mini)um, p(ro)ut CONSI(MI)LES ALLO(CATIONES) FACTE SUNT EX ANTIQUA CONSUE(TUD)INE; sicut continet(ur) in diversis comput(is) p(re)cedentibus, iii^a ii^a.

“Summa, xviii^a vi^a ob(olus).”(i)

*“Et in defectu redd(it)us terre quondam —, superius onerat(i) in titulo redd(it)us assise ad xii^a, tract(e) in d(omi)nicum — [*478 summa xii^a: Et in defectu redd(it)us terre quondam Ric(ar)di Ligh, superius onerat(i) in titulo redd(it)us assise ad viii^a vi^a, tract(e) in d(omi)nicum per annum, prout allocatur in quamplurib(us) comput(is) p(re)cedent(ibus) de viii^a vi^a: Et in defectu redd(it)us terre de Pixton, superius onerat(i) in dicto titulo ad xl^a v^a per annum, eo quod date sint Baldewino, filio Gerard(i), in excambio pro Corff, Fulford, et Naylesborne, per ep(is)copum Ric(ard)um xl^a v^a: Et in defectu redd(it)us terre quondam Jor-

(a) 23l. 17s. 4d.

(b) Vide 3 M. & R. 163.

(c) Query meaning of this term.

(d) As to fines payable for being freed from the obligation to attend the three-weeken court, see Customs, No. 32.

(e) In the account of the two reeves (*supra*, 463, n.) of Taunton borough for this year (1521-1522), credit is given for 20d. as perquisites of the Pipoudre court.

(g) 4l. 11s. 3d.

(h) 80l. 2s. 3½d.

Under the head—Exitus Manerii—the reeve of Naillesborne charges himself: “Et de ii^a vi^a, de residuo denar(iorum) be(ati) Petri (Peter's pence, otherwise called Romescot) ib(ide)m, per annum.”

(i) 18s. 6½d.

dani de Fiddew, superius onerat(i) in dicto titulo ad iv^a vi^a per annum, tract(e) in d(omi)nicum per ep(iscop)um Godefrid(um) (a) iiiⁱ xiⁱ: Et in defectu redd(it)us terre de Brigwater, superius onerat(e) in dicto titulo ad iii^a per annum, eo quod ablat(e) sint per Will(iel)mum Brauer tempore ep(iscop)i Geoff(red)i (a) iiiⁱ: Et in defectu redd(it)us terre quondam Joh(ann)is Cleefle, in la Floré superius onerat(i) in dicto titulo ad vi^a, tract(e) in d(omi)nicum d(omi)ni vi^a: Et in defectu redd(it)us, quondam Philippi Dawe, pro una acra p(ra)ti ibid(em) superius onerat(i) in dicto titulo ad xii^a, tract(a) in d(omi)nicum, per annum xii^a: Et in defectu redd(it)us terre quondam Thome Godelake, pro una acra p(ra)ti juxta —, superius onerat(i) in dicto titulo ad vi^a, tract(a) in d(omi)nicum, per annum vi^a: Et in defectu redd(it)us terre quondam Nich(ola)i Atwille pro ii acris p(ra)ti superius onerat(i) in dicto titulo ad iiiⁱ, tract(is) in d(omi)nicum, per annum iiiⁱ: Et in defectu redd(it)us unius acre p(ra)ti juxta vivar(ium) quondam Thome Wallyng, superius onerat(i) in dict(o) titul(o) ad iiiⁱ, tract(e) in d(omi)nicum, per ann(um) iiiⁱ: Et in defectu redd(it)us i acre p(ra)ti, quondam Ric(ard)i: Et in defectu redd(it)us terre quondam *479] Walt(eri) Portman, *superius onerat(i) in dicto titulo ad v^a: modo dimittitur pro iiiⁱ: Summa defectus, ii^a: Et in defectu redd(it)us cujusdam vie per quondam Will(ielm)um Gore, jacen(te) juxta terr(am) nuper Joh(ann)is Lychefeld, in Ex(tra)port(am), tenden(tē) usque terram p(re)dicti Will(elm)i, superius onerat(e) in dicto titulo ad xx^a per annum, eo quod p(re)dict(us) Will(elm)us mortuus est et via predicta non occupat(ur): Summa defectus, "Summa, liiii^a xxiii^a." (b)

"Et in denar(iis) liberat(is) Joh(ann)i Welling receptori(c) castri de Taunton, de exitibus hujus anni, per manus dicti receptoris. £x.(d)

"*Et quietus est.*"

The other pipe-rolls of the hundred of Holway, rejected by the learned judge, contained entries of a similar character, and were in the same form. In one, credit is taken by the reeve for a payment to workmen for making bricks for the lord in his wood at Haidwood; in another, for a payment to a carpenter for repairing a gate in Haidwood.

The learned judge, in summing up the case to the jury, said:—"The *480] question for your consideration is, *whether the intention was, to grant the surface, or to grant the land: and it lies within a narrow compass. But, to prevent the necessity of the parties coming again,

(a) Godfrey and Geoffrey were the same bishop.

(b) 2l. 15s. 11d.

(c) "The customary tenants are, upon being summoned, to attend once a year at a *choise* court, at which they are to make choice of the lord's officers for the year following,—a receiver, one several reeve for every hundred to collect the lord's rents, beadles to serve the lord's courts and to gather the amercements and customary works, and to make account thereof to the reeve." Customs, No. 30. *Et vide supra*, 463 (b).

(d) "All rents, fines, heriots, works, and customs which are due and payable to the lord of the manor every year have usually been paid by the reeves in every hundred, and others to whom it doth appertain, unto the lord's officers at Winchester, according to their usual and accustomed times; and ought never, by the custom of the said manor, to be drawn any further for the payment of the same." Customs, No. 45.

I will take your opinion upon two points, which are not wholly questions of law. In the first English court-roll, relating to this property, which is of the year 1745, the copyhold estate is described as 'The pasture, wood, and underwood of Haydwood, containing by estimation, sixty acres, with the appurtenances.' In all the subsequent court-rolls, the copyhold is described in the same terms.

"I will take your opinion, first, upon the question,—whether, by these words, was meant 'pasture land, wood land, and underwood land,' referring to the user, which may be resorted to for the purpose of explaining the words used, and ascertaining whether it was intended to pass the land itself." (a)

The learned judge then read the evidence of Ham and the other witnesses called for the defendant as to the state and user of the land. (b) The jury said, "We consider that the words included the land itself."

The learned judge proceeded,—

"With respect to the second point on which I desire to have your opinion, I would observe, that there was some evidence that this wood, called Haidwood, had, in early times, (c) been in the hands of the lord." His lordship then called the attention of the jury to such of the pipe-rolls as had been received in evidence; adding: "It is said by the defendant that no explanation has been given as to the nature of those rolls; and you should take into your consideration the survey of 1572, and correct, if possible, the one set of entries by the other. From the first time the roll is in English, we find a change. This *may [481 have arisen from the tenant's requiring a statement of his actual interest. I will, therefore, put the same question with reference to the ancient Latin entries as I did with reference to the modern English entries,—whether, by the words 'pasture of the wood and underwood of Haidwood,' it was intended to point out the *land* on which the wood and underwood grew? (d)—whether the terms were used as descriptive of the land itself? Can you so infer from the modern user? (d) The jury said, "We find as before."

Exceptions were tendered in respect of each of the questions submitted to the jury; but that course was abandoned, (e) and no bill of exceptions was sealed.

Manning, Serjt., in Easter term last, moved for a new trial, on three grounds,—the improper rejection of evidence,—misdirection,—and, that the verdict was against the evidence.

Upon the first point, he referred to an entry in which the reeve of

(a) This question was excepted to.

(b) *Supra*, p. 461.

(c) Within legal memory.

(d) This formed the subject of another exception.

(e) Upon the prosecution of the bill of exceptions, the most favourable result would have been the awarding of a *venire de novo*, which, after much expense and delay, would not have been more beneficial than a new trial, except as containing on the record an intimation as to the course which ought to be pursued.

Holway takes credit for money paid to a carpenter for repairing a gate in Haidwood, the reeve charging himself in the account with 14*s.* received for wood sold from Haidwood in the same year, and with 13*s.* 4*d.* for wood sold in Whitford the same year. [WILDE, C. J. I have been in several cases in which it was distinctly decided that it was receivable in evidence by force of the discharge.^(a) Some of those cases have been reported. I don't know whether *Ward v. Lord Durham* was.^(b)] It was *482] so decided in the reported *cases of *Crease v. Barrett*, 1 C. M. & R. 919, 5 Tyrwh. 458, and *Doe v. Turford*, 3 B. & Ad. 890. The document being admissible for one purpose, was admissible for all purposes; *Mayor of Exeter v. Warren*, 5 Q. B. 773.

Secondly, there was misdirection in the learned judge's first taking the opinion of the jury upon the effect of the modern entries coupled with the modern user, and withdrawing their attention from the ancient entries. There could be no doubt, that, looking at the modern entries and the modern user *alone*, the construction to be put upon those entries would be that the whole interest passed; and the jury found the only verdict which upon that one-sided view of the case they could find. The learned judge then put the second question,—whether by the old Latin entries the whole interest was intended to pass? Here, they were hampered by the answer which they had returned to the first question. As the jury had already found that the copyhold estate had, for more than 100 years, included the whole interest in the land, it would have been inconsistent with the immemorial continuous identity of the customary tenement, to find that the Latin entries had conferred a more limited right upon the copyholder.

But the learned judge ought not to have left these matters to the jury at all. It was for *him* to decide upon the effect of these written documents, after the jury had ascertained the existence or non-existence of any extrinsic facts which could affect the construction of those documents.

Thirdly, the evidence actually admitted by the learned judge, was sufficient to entitle the plaintiff to a verdict.

Kinglake, Serjt., and *M. Smith*, now showed cause. The contention *483] on the part of the lessor of the plaintiff *will be, that, under the words "*pastura bosci et subbosci*," in the ancient grants produced at the trial,—and which, in the modern entries, since the statutes 4 G. 2, c. 26, and 6 G. 2, c. 14, are rendered "pasture, wood, and underwood,"—the herbage only passed, and not the soil itself. There is nothing in the nature of the entries in question to render inadmissible evidence of usage, to explain the ambiguity of the terms used, and to show that they were intended to convey the land. And for this purpose the evidence that was given at the trial was amply sufficient. The authorities show that the word "*pastura*" is sufficiently large to carry the land. In Co

(a) The lord chief justice was not in court when cause was shown against the rule.

(b) Tried at the Hants Summer Assizes, 1838, cor. GASELEE, J.

Litt. 4 b, it is said: "If a man hath twenty acres of land, and by deed granteth to another and his heirs *vesturam terræ*, and maketh livery of seisin *secundum formam chartæ*, the land itself shall not pass, because he hath a particular right in the land: for, thereby he shall not have the houses, timber-trees, mines, and other real things parcel of the inheritance, but he shall have the vesture of the land, that is, the corn, grass, underwood, swepage, and the like, and he shall have an action of trespass *quare clausum fregit*. The same law, if a man grant *herbagium terræ*, he hath a like particular right in the land, and shall have an action *quare clausum fregit*: but by grant thereof and livery made the soil shall not pass, as is aforesaid." "A man seised of divers acres of wood, grants to another *omnes boscos suos*, all his woods,—not only the woods growing upon the land pass, but the land itself, and by the same name shall be recovered in a *præcipe*; for, *boscos* doth not only include the trees, but the land also whereupon they grow. The same law if a man in that case grant *omnes boscos suos crescentes*, &c., yet the land itself shall pass; as it hath been adjudged." "If a man doth grant all his pastures, *pasturas*, the land itself employed to the feeding of beasts doth pass, and also such *pastures or feedings as he hath in another [*484 man's soil. Between *pastura* and *pascuum* the legal difference is, that *pastura* in one signification containeth the ground itself called pasture, and by that name is to be demanded. *Pascuum*, feeding, is wheresoever cattle are fed, of what nature soever the ground is, and cannot be demanded in a *præcipe* by that name." The same doctrine is to be found in Comyn's Digest, title *Grant* (E. 5). That usage may be received to construe an obscure grant, is clear from many authorities. DALLAS, C. J., in *Chad v. Tilsed*, 2 Brod. & Bingh. 406, 5 J. B. Moore, 192, says: "The rule laid down in a book of authority on this subject, (a) is, 'If the language of an ancient grant be obscure or doubtful, constant usage may be resorted to, to expound, though not to control the deed;' and the uniform course of modern authorities shows, that, however general the grant, usage may afford a true construction of it, reducing this question to a question of fact, viz. what was the usage here?" In *Stammers v. Dixon*, 7 East, 200, it was held, that one may hold the *prima tonsura* of land, as copyhold, and another may have the soil and every other beneficial enjoyment of it, as freehold: and ancient admissions of the copyholder and those under whom he claims the land, by the description of "*tres acras prati*," may be construed only to carry the *prima tonsura*, if, in fact, they have enjoyed no more under such admissions, while another has had the after-crop, and has cut the trees and fences, scoured the ditches, repaired the fences, and kept the drains; though the copyholder may have paid all the rates and taxes,—which was in his own wrong. "The word *close*," said Lord ELLENBOROUGH, "imports, in the abstract, the interest in the soil; and, if the defendant only

(a) Phillips on Evidence, 5th edit., Vol. I. p. 547.

*485] *make out that he has a partial interest in the land, such as the right *primæ tonsuræ*, the issue must be found against him. And the evidence shows, that, from all time, the defendant's benefit has been confined to the taking the fore-crop,^(a) and that every other benefit of the land has been enjoyed by those from whom the plaintiff claims. We must, then, construe the rights of the parties, however derived from ancient grants, consistently with the possession: and there will then exist a copyhold interest in the *prima tonsura* for the defendant, and every other freehold interest in the land for the plaintiff. But this, it is said, is inconsistent with the entries on the court-rolls, which grant an interest in the soil to the tenant, and were evidence for the jury, to show in what right the defendant claimed and took the fore-crops. The admissions are, to '*tres acras prati*:' but, can it be said that the word *prati* is not open to receive any construction which will carry a less interest than the whole right to the soil? The judge thought, that, if the usage in fact were that the defendant and those under whom he claimed had never enjoyed any other benefit of the land than the fore-crop, and that those under whom the plaintiff claimed had enjoyed every other benefit of it, that word might receive a construction conformable to the actual enjoyment: and I think he was right in that opinion. And then he properly put the question to the jury to say how the fact of the enjoyment was: and, when they found that the possession of everything but the *prima tonsura* had been with the plaintiff, he gave it as his opinion that the word *prati* would admit of such a construction as to pass only the fore-crop to the defendant, and that therefore, notwithstanding those admissions, the jury might find for the plaintiff,—reserving *486] for the *judgment of this court the simple question of law, upon the legality of such construction. With that direction, so understood, I do not find fault, thinking it substantially right." That case is precisely in point. [MAULE, J. The entries before 1745 seem to exclude the wood and underwood, rather than the land.]

The documents that were objected to, and rejected by the learned judge,—the pipe-rolls of the manor of Taunton Deane,—came from the custody of the clerk of the castle. These were tendered as evidence on the ground that they contained accounts in which the deceased reeves charged themselves with moneys received on account of the lord. They were objected to as altogether inadmissible, on account of the custody from which they came, and also on the ground that it did not appear, upon the face of the particular entries, or on any other part of the account, that the reeve acknowledged the receipt of the specific sum for which by the entry he claimed a credit. To render documents of this sort admissible, they must be in some way authenticated: it is not in general enough to show that the party is dead. As to ancient documents, the rule has to some extent been relaxed; but still there must be some-

^(a) *Tenerrima prata subsecuisse.* Ov. Art. I. 299.

thing upon the face of the document to identify it as the document which it purports to be: *The Mayor, &c., of Exeter v. Warren*, 5 Q. B. 773. These accounts do not appear to have been audited, or signed; nor is any balance struck: they are evidently imperfect; and there is nothing upon the face of them,—as there was in the documents tendered in *The Mayor, &c., of Exeter v. Warren*,—to show that they were originals. In *Phillipps on Evidence*, 9th edit., vol. I. p. 310, it is said: “It is a question of considerable importance how far declarations against interest are receivable in respect of matters forming a part of *the declarations, but not in themselves affecting the interest of [487 the declarant. Where declarations of deceased persons, acknowledging the receipt of money, have been admitted, it appears that they have often been admitted as evidence, not merely of the fact of the deceased having received the money, but also of the circumstances stated as the occasion of the payment.”(a) In *Warren v. Greenville*, 2 Stra. 1129, upon a question whether a surrender to a recovery could be presumed, the book of a deceased attorney was produced, which contained a charge of a sum for suffering a recovery, two items of which related to the drawing of a surrender; and it appeared by the book that the bill was paid: the court held that the entries were admissible evidence, and material upon the inquiry into the reasonableness of presuming a surrender. In *Higham v. Ridgway*, 10 East, 109, upon a question respecting the age of a person suffering a recovery, an entry made by a deceased accoucheur in his book, of having delivered a woman of a child on a certain day, referring to his ledger, in which he had made a charge for his attendance, and marked the charge as *paid*, was held admissible evidence of the time of the child’s birth. Lord ELLENBOROUGH there said: “The question is, whether the books of a man-midwife attending upon a woman at the time of her delivery, and making charges for such his attendance, which he thereby acknowledges to have been paid, are evidence of the time of the birth of the son, as noted in those entries. That the books would be evidence in themselves, as recording this event of the birth, and other similar events in the course of his attendance on his patients, at the several times when they took place, I am by no means prepared to say. Nor is my opinion *in this case formed with reference to [488 the declarations of parents, &c., received in evidence, as to the birth or time of the birth of their children. But I think the evidence here was properly admitted, upon the broad principle on which receivers’ books have been admitted, viz. that the entry made was in prejudice of the party making it. In the case of the receiver, he charges himself to account for so much to his employer. In this case, the party repelled by his entry a claim which he would otherwise have had upon the other for work performed and medicines furnished to the wife; and the period of her delivery is the time for which the former charge is made; the date

(a) See the cases collected in the note to *Barker v. Ray*, 2 Russ. 67.

of which is the 22d of April, when it appears, by other evidence, that the man-midwife was, in fact, attending at the house of William Fowden. If this entry had been produced when the party was making a claim for his attendance, it would have been evidence against him that his claim was satisfied. It is idle to say that the word *paid* only shall be admitted in evidence, without the context, which explains to what it refers: we must, therefore, look to the rest of the entry to see what the demand was which he thereby admitted to be discharged. By the reference to the ledger, the entry there is virtually incorporated with, and made a part of, the other entry, of which it is explanatory." That case was much considered in *Davies v. Humphreys*, 6 M. & W. 153. There, by a promissory note, Evan Humphreys, W. Davies, and John Humphreys jointly and severally promised to pay to John Evans 300*l.*, with interest. W. Davies having afterwards paid John Evans 280*l.* on account of the note, the latter made the following endorsement upon it:—"Received of W. Davies the sum of 280*l.* on account of the within note, the 300*l.* *having been* *489] **originally advanced to Evan Humphreys.*" In an action brought by W. Davies, who had paid the whole amount due, against John Humphreys, to recover contribution from him "as a co-surety," it was held that the endorsement was admissible in evidence to prove not only the payment of the 280*l.*, but also that the money was originally advanced to Evan Humphreys as principal. And PARKE, B., in delivering the opinion of the court, said (6 M. & W. 166): "In the case of stewards' books, the receipts of money as rent, would be equivalent to the proof of payment of money as rent, and establish the title of the person receiving it, and the like. But the authorities have gone beyond that limit; and the entry of a payment against the interest of the party making it, has been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it; as in the case of *Higham v. Ridgway*, where the memorandum of the payment of the midwife's charge for attending a birth, was held to be evidence of the date of the birth;(a) and *Doe v. Robson*, 15 East, 32, where the entry of charges paid for a lease, as drawn on a certain day, was held to be evidence that the lease was so drawn, which the proof by an eye-witness of the same payment on account of such charges, would not have been: and there are many other cases to the same effect. Without overruling these cases (and we do not feel ourselves authorized to do so), we could not hold the memorandum in question not to be admissible evidence of the truth of the whole statement in it, and consequently to be evidence, not merely that 280*l.* was paid by the plaintiff to the payee, as for a debt due from Evan Humphreys as principal, but also of the *490] fact that the debt *was* due from Evan Humphreys **to him.*" The language of the court there pretty strongly intimates that the inclination of judges of the present day is, not to extend the rule. In

(a) Was held to make the corresponding entry in the other book evidence of the date of the birth.

Stead v. Heaton, 4 T. R. 669, where the question was as to the existence of a customary payment for the repair of a parish church, churchwardens' accounts were produced, in which were the following entries:—"Received of Haworth, who this year disputed this our ancient custom; but, after we had sued them, paid it accordingly, 8*l.*, and 1*l.* for costs." At the head of the same page was written—"It is an ancient custom thus to proportion church-lay: first, the chapelry of Haworth pay one-fifth, Bradford a third of the remainder, and the rest to be legally divided according to the churchwardens of the several other townships in the parish." The court were of opinion that the entry of payment was clearly admissible, because the officers thereby charged themselves with the receipt; and that the other entry was admissible because immediately referred to; and that both of them, being written on the same page, and on the same subject, must be taken into consideration together,—being both parts of one and the same transaction, each explaining the other. In *Rudd v. Wright*,^(a) a survey was tendered in evidence, which had been made for the use of Trinity College, Cambridge, the impropiators of a living of which the plaintiff was vicar, and in this survey certain closes were stated as being titheable to the vicar. Lord LYNDHURST observed, that, although this document would be evidence against the college in a suit between them and the vicar, it would admit of some consideration whether it was admissible in evidence against a third person; but that it was unnecessary to decide that question, because the object of producing *the survey in evidence arose out of a marginal note to the sur- [491]vey. He thought the marginal note could not be received in evidence, inasmuch as it was in the nature of a collateral and incidental observation made by the person who framed the survey; and that it did not follow, because a document is received in evidence, in which there are entries against the interest of a party, that therefore collateral and independent matter, which is not a necessary part of such entries, ought to be received. The point was much discussed in *Chambers v. Bernasconi*, 1 C. M. & R. 347 (and see 1 C. & J. 451). By the course of the office of the sheriff of Middlesex, the officer making an arrest was required to make a return in writing, signed by him, of the arrest, and of the place where the arrest took place. A writ having been delivered to Wright, a sheriff's officer, to arrest Chambers, Wright arrested him accordingly, and made the following return,—“9th November, 1835. Arrested A. H. Chambers, in South Molton Street, at the suit of W. Brereton;” which return was signed by the officer, and sent by him to the sheriff's office on the execution of the writ, and was then filed with the writ, according to the course of the office. The writ and certificate were produced by the under-sheriff at the trial. In an action brought by Chambers against a third party, it was held that the certificate was not admissible, after the death of the officer, to prove the place where

(a) *Cor. Lord LYNDHURST*, C. B., Exch., 11th July, 1832; cited 1 Phill. Evid. 9th edit. 314.

the arrest was made. The case of *Rowe v. Brenton*, 3 M. & R. 267, does not advance the position for which it was cited. The only portion of the account that was received there, was, that by which the receiver charged himself,—upon the principle of its being an entry against the interest of the party making it. The only authority which in any degree tends to show that the discharging portion of an ancient steward's *492] *or reeve's account is admissible in evidence, is, the case of *Bullen v. Michel*, 2 Price, 399. It was there held, that ancient entries made by the monks of an abbey, relating to an endowment by them of a vicarage (whether perfect or not) are evidence (*quantum valeant*) of their subject-matter; although such entries be mixed with extraneous memoranda, and the book be not confined or appropriated to subjects *ejusdem generis*: and, being admitted, they may be read throughout, for the purpose of proving anything which is material to the issue, provided it is relevant, although it go to affect third persons who were not privy to it, and could have had no cognisance of the matter to which it relates. The ground upon which the admissibility of the documents was there rested, can hardly be supported at the present day. The accounts, says GIBBS, C. B., "purport to be accounts of the reeve of the abbey, allowed by the bailiff of the abbey; the reeve receives certain profits of land for the abbey, and he discharges himself by certain sums which he seeks to have allowed in his account, and which the bailiff, on behalf of the abbey, does allow. So that one side of the account (according to the doctrine applicable to such instruments), the charging side will be evidence, because the reeve charges himself; and the discharging side will be evidence, not only because it is part of the same account, but because the bailiff admits the propriety of it: in one case, it is against the reeve to charge himself; and, in the other case, it is against the bailiff to allow his discharge. Now, the articles of discharge contain certain payments which the reeve insists that he made for the tithes of those lands out of which the profit with which he charges himself arose; and those are tithes of lands within the parish of Newton Sturminster. As far as those accounts go to *493] *show that those tithes to which the accounts immediately relate were at that time rendered, we think they are admissible. I use the word 'admissible' studiously: we do not say that they determine the point, nor do we say (whether they determine the point or not), what effect that ought to have upon the verdict of the jury on the general question; but we think that they are admissible evidence to prove the fact which they purport to announce, *viz.* that those tithes mentioned in the accounts were paid." [MAULE, J. That case also, probably, proceeded upon the ground of the entries being against the interest of the party making them.] *Knight v. The Marquess of Waterford*, 4 Y. & C. (Exch.) 298, is precisely in point. There, in order to show that the former lords of a manor had been liable for land-tax and poor-rates on tithes,

the defendants' counsel proposed to put in certain steward's accounts, containing entries for and against himself, the entries in his favour being in the nature of deductions from those to his debit, but appearing as separate items, though dated about the same time. Thus, on one side of these accounts was, "April 16th. Received of Thomas Watson, Esq., for half a year's rent for the corn and petty tithes of Heatherslaw, due at Whitsunday, 1759, 30*l*." On the opposite side was an entry in discharge of the former item, by payment or allowance to Thomas Watson of 13*s*. for land-tax and poor-rates on the tithes. The counsel for the defendants contended that this latter entry was receivable; for, that, if, instead of being placed on the opposite page, the 13*s*. had been merely deducted from the former item, by the use of the words "after deducting 13*s*," the entry in that shape would clearly have been receivable in evidence for the defendants, as proof of the balance; and that there could be no difference between receiving one *entry in that shape, and [494 the two in the manner proposed: and *Stead v. Heaton*, *Bullen v. Michel*, *Williams v. Geaves*, 8 C. & P. 592, and *Doe d. Lord Teynham v. Tyler*, 6 Bingh. 541, 4 M. & P. 377, were cited. But ALDERSON, B., said: "The payment of the half-year's rent is a simple fact stated. In *Stead v. Heaton*, the matter stated referred to something else; it required that other thing to be read, in order to explain the fact as stated. There is a material distinction between the one case and the other. I think *Stead v. Heaton* goes to the extreme verge of the law. If, in this case, the sum charged was stated to be a sum less by the deduction on the opposite side of so and so, possibly, according to *Stead v. Heaton*, you might have referred to the opposite side. In *Bullen v. Michel*, the decision was right, without taking into consideration all the reasons given for it. I think I cannot admit this evidence." And it was accordingly rejected. In *Marks v. Lahee*, 3 N. C. 408, 4 Scott, 137,—where an entry of a tender and refusal, made by a deceased clerk of the plaintiff's attorney, in a day-book kept for the purpose of minuting his daily transactions, was held to be admissible to prove the tender,—TINDAL, C. J., says: "I am unwilling to extend the effect of the decisions on this subject: for, I am sensible how important it is to proceed, if possible, upon evidence given upon oath, and subject to cross-examination. Exceptions to that practice ought to be strictly limited: but the ground on which I consider this entry admissible in evidence, is, that I cannot read it without seeing that it does charge the party making it, with the receipt of 100*l*., for which he was to account to his employer." The circumstance of the two sides of the account being connected with each other, as relating to the same subject-matter, clearly makes no *difference. In *Prince v. Samo*, 7 Ad. [495 & E. 627, it was held that a witness who has been cross-examined as to what the plaintiff said in a particular conversation, cannot, on that ground, be re-examined as to other assertions made by the plaintiff in the same conversation, but not connected with the assertions to which the

cross-examination related; although the assertions as to which it is proposed to re-examine, be connected with the subject-matter of the suit.

It was in evidence, that the plaintiff granted the very tenement which was the subject of this action, to the defendant, under this very description. It clearly was not competent to him to derogate from his grant.

The rejected evidence merely went to a point which was put to the jury as a matter that was not in contest between the parties, *viz.*, that, at some period or another, the lord was in possession of Haidwood. Even if the evidence was improperly rejected, therefore, that is no ground for a new trial. In *Doe d. Welsh v. Langfield*, 16 M. & W. 497, it was held,—upon the authority of *Doe d. Lord Teynham v. Tyler*, 6 Bingh. 541, 4 M. & P. 377, and *Crease v. Barrett*, 1 C. M. & R. 919, 5 Tyrwh. 458, 475,—that, where evidence tending to establish a point already supported by more direct proof, is improperly rejected, the court will not grant a new trial on that ground, if they see that the case would not have been advanced further by admitting the particular piece of evidence.

There is no pretence for saying that the verdict was against the evidence.

Manning, Serjt. (with whom were *Butt* and *Slade*), in support of the rule. The accounts in question were *preserved among the muniments of the manor at the castle of Taunton. [MAULE, J. They are a sort of *quasi* record of the officer of the lord, in which he copied the accounts of the reeves. How would these documents charge the reeve, had he been living?] Coupled with the fact that the reeves were in the habit of accounting annually at the castle, these accounts clearly would be evidence to charge them. In *Brune v. Thompson*, Car. & Marsh. 34, in assumpsit for tolls, a computus of a prepositus or reeve, of 33 H. 6, which was brought from the muniment-room of the lord of the manor, and in which the reeve purported to charge himself with the receipt of money,—was held to be admissible in evidence, though not signed, and without any proof of the handwriting. The accounts there were precisely in the same form as the accounts tendered here. [MAULE, J. There are cases which show that entries in which a man charges himself on the one side, and discharges himself on the other, are admissible altogether, where the whole is so incorporated as to show it to be one entire subject-matter, and where the thing would be otherwise unintelligible; as in the case of the accoucheur,—*Higham v. Ridgway*. But the question is, can you read an entry which *per se* would not be admissible, merely because it accompanies entries that are admissible, where it is not essential to the understanding of that which is legitimate evidence?] In *Williams v. Geaves*, 8 C. & P. 592, it was held to be no objection to the admissibility of an entry by which a deceased steward charges himself, that the balance of the account is in favour of the steward. In the notes to *Higham v. Ridgway*, in *Smith's Leading Cases*, vol. I. p. 195, b, it is said: “It was stated, in the commencement of this note, that it seemed to

follow from the decision in *Doe v. Vowles*, 1 M. & Rob. 261, coupled *with Lord ELLENBOROUGH's observations in the principal case, [497 that an entry is not admissible, as against interest, in which a man acknowledges the discharge of a debt, of the existence of which there is no evidence, save from the entry. The same rule, however, even if *Doe v. Vowles* be still law, does not necessarily apply to the case of a receiver charging himself with money on one side of an account, and discharging himself upon the other. It is true, indeed, that one part of the entry is *for his benefit*. Still, he does not *entitle himself* to anything positive, as in the former case; and, if he strike a balance against himself at the foot of the account, and acknowledge that balance to be unpaid, the result of the whole is clearly to his disadvantage. But, even if the balance appear to be paid, the case will not be like that of *Doe v. Vowles*; since, in an action brought against the receiver by his employer, the entry would be evidence against him, and the jury might, if they thought proper, or if evidence tending to that conclusion were produced, believe the part in which he charged himself with the receipt of moneys, and disbelieve the part which went in his discharge; whereas, in *Doe v. Vowles*, it would have been impossible to use that part of the entry which militated to the disadvantage of the tradesman, without first positively admitting that which was for his advantage, inasmuch as the receipt assumes the existence of the debt admitted therein to have been received. The question as to the admissibility of such an account, was discussed in *Doe d. Teynham v. Tyler*. But it had previously received an express decision during the trial of the great case of *Rowe v. Brenton*: the point for which that case is now cited, appears in 3 M. & R. 267. It arose as follows:—Stephen Pearce, a witness, proved that his father was toller to the Lemon family: his memory did not go back so far as 1765; but he produced a book, in his father's handwriting, of that *year, [498 containing a debtor and creditor account of receipts of (tin-) tolls, and said, that, as far back as his recollection went, his father used to keep similar books. Sir *James Scarlett* proposed to put in this toll-book; to which *Brougham* objected, arguing, that, 'where a man charges himself with the receipt of money, that is taken to be evidence against him, because it is a declaration in writing against his own interest, and it is not to be presumed that a person would make such a statement, unless it were true. But, suppose there is, in part of the same document in which the charge appears, a discharge also, which squares the account, or, perhaps, leaves a balance in his favour; then, taking the whole together, charge and discharge, both sides of the account, the reason fails, because it is no longer a declaration by a party *against his own interest*; it may be a declaration *for his own interest*.' LITTLEDALE, J. 'A man is not likely to charge himself, for the purpose of getting a discharge.' Lord TENTERDEN, C. J. 'Almost all the accounts that are produced, are accounts on both sides. That objection would go to the very root of that

sort of evidence.' The same point has been since decided by PATTERSON, J., in *Williams v. Geaves*, upon the ground above taken, where the balance actually *was* in favour of the person making the entries." One of the earliest cases upon this subject, is *Warren v. Greenville*, 2 Stra. 1129, where an entry in the book of a deceased attorney, of a charge for suffering a recovery, was admitted to prove that the recovery had been suffered. [V. WILLIAMS, J. The entry was made evidence by the admission of payment.] The whole entry was evidence. So, in *Doe d. Reece v. Robson*, 15 East, 32, entries of charges made by an attorney in his books, showing the time when a certain lease, prepared for a client of his, *499] *was executed, and which charges appeared to have been paid, (a) —were held to be evidence, after the attorney's death, to show that the lease executed under a power to lease in possession and not in reversion, which lease bore date the 31st of August, 1770, and purported to grant a term *from the 29th of September then next ensuing*, was not in fact executed till *after* the 29th of September, inasmuch as the charge for drawing and engrossing the lease was under the date of October, 1770. Lord ELLENBOROUGH there said: "The ground upon which this evidence has been received, is, that there is a total absence of interest in the persons making the entries to pervert the fact, and at the same time a competency in them to know it." And BAYLEY, J., said: "It has long been an established principle, that, if a party who has knowledge of the fact, make an entry of it, whereby he charges himself, or discharges another upon whom he would otherwise have a claim, such entry is admissible in evidence of the fact, because it is against his own interest." In *Crease v. Barrett*, it was held that an entry by a deceased person, charging himself, is admissible against strangers, even though it appears that the facts stated in that entry were not known to him of his own knowledge. In *Lancum v. Lovell*, 6 C. & P. 443, it was proved that it had been the practice so long as the witness who was conversant with the subject could remember, for the town-treasurer to furnish the town-clerk with information from which he made out his (the treasurer's) accounts, and also for the treasurer to attend before the auditors, unless prevented by illness or accident, and produce vouchers verifying the town-clerk's statement: entries in books of that description, commencing *500] with the year 1766, were *tendered in evidence; *some of them were signed by the auditors as allowed*, and to some of them appeared only an unsigned entry of their having been examined: it was held that those which were signed by the auditors were admissible, without proof of any attendance by the particular treasurer before the auditors, or of any entry in his writing charging himself,—partly on the ground that there was reasonable evidence of his having made the town-clerk his agent for the making out of the accounts. In *Doe d. Bodenham v. Colcombe*, Car. & M. 155, it appeared that the rent-rolls of an estate

(a) *Quere*, by a distinct entry of discharge?

were unsigned, and were drawn out in four columns; the first and second columns containing the tenants' names, and the amount to be paid by each, were in the handwriting of the owner of the estate; the third and fourth columns, containing the amount actually received of each tenant, and the date when received, were in the handwriting of a deceased steward: it was held that these rent-rolls were receivable in evidence, as accounts of a deceased steward charging himself. The accounts here consisted of entries by which the reeve debited himself with sums received on the one side, and on the other side showed how he had disposed of the moneys: they were entire and indivisible, and clearly admissible, according to the rule laid down by PARKE, B., in *Davies v. Humphreys*, 6 M. & W. 153, where that learned judge says that "the entry of a payment against the interest of the party making it, has been held to have the effect of proving the truth of other statements contained in the same entry, and connected with it." Here, the whole account is one simultaneous entry; and there is a direct connexion between the receipt of the lord's money and the application of that money. In *Musgrave v. Emmerson*, 16 Law Journ. N. S., Q. B., 174, a paper, signed by a deceased steward, charged him with the receipt of a gross sum: [*501 in the same box was found an ancient rental, in the same handwriting, but unsigned, containing an account of the items which, added together, made up the gross sum with which the deceased steward so debited himself: and it was held admissible. [V. WILLIAMS, J. The aggregate of the items on the unsigned paper being the same as that in the account which was signed by the steward, it was held to be sufficiently authenticated. That is all that case amounts to.] In *Viner's Abridgment*, title *Evidence* (A. b, 66,) vol. 12, p. 131, is an original case to the following effect:—"Bill in chancery, by trustees of a charity, to subject an estate to a rent of 3*l.* 13*s.* 7*d.* against the owners of the land, one whereof was lately purchaser, but had reserved money in his hands on account of this rent, though not certain out of what lands it was issuing. Several court-rolls were read, where this rent was mentioned, but not said out of what lands; others mentioned lands in such a place. They read also papers (copies of rentals given to bailiffs to collect by), and read evidence that these bailiffs charged themselves with the sums there mentioned; for, the charge of the bailiff's receipt, that makes these rentals evidence: so the bailiff's accounts. Decree for plaintiff against all defendants, they joining in defence, and it not appearing out of what particular lands the rent was issuing, so no remedy at law. Pasch. 11 G., in Canc." [MAULE, J. There is no doubt that entries by bailiffs, charging themselves, are evidence.] In none of the cases is the rule laid down so narrowly as is now suggested. And the doctrine of the court of Exchequer, in *Bullen v. Michel*, goes the full length of sustaining the argument. The *only distinction between the present case and *Higham v. Ridg-* [*502 way, appears to be this:—There, the item favourable to the

accountant was received in evidence, because, in the same account, he admitted that the item had been discharged by *direct* payment by the employer. Here, it was sought to support the favourable item, by showing that the accountant had admitted that it was discharged by *indirect* payment, *viz.* by the receipt of the amount from the employer's debtors,—a distinction which *Rowe v. Brenton*, *suprà*, 497, 498, and the other cases cited show to be a distinction in form only—a distinction without a difference. If this had been a proceeding to which the reeve was a party, it might have been fairly said that an entry made by the reeve in his own discharge could not, except under special circumstances, be evidence for him. But the argument on the other side is, that there are here no special circumstances to make the entry evidence for the reeve. If so, he could have no motive for making the statement, unless that statement were warranted by the fact. It is the very case adverted to by Lord ELLENBOROUGH, *suprà*, 499, of absence of interest to *pervert*, with competency to *know*, the fact. The disposition of the courts, as well as of the legislature, has been, of late, to widen the door for the *admissibility* of evidence,—trusting to the discretion of judges and juries in using due caution with regard to the circumstances which may affect the *weight* of the evidence. Here, the court is invited to take a backward step, and to reject evidence the *cogency* of which cannot be doubted.

The entries in question were admissible on another ground, *viz.* that they were accounts kept by a servant in the ordinary course of his employment: *Price v. The Earl of Torrington*, 1 Salk. 285 (1 Smith's Leading Cases, 139); *Doe d. Patteshall v. Turford*, 3 B. & Ad. 890 *503] **[MAULE, J.* In all those cases, the entry was part of the transaction it purported to record. Of the same order is the presumption that a letter has been posted, where the ordinary course of business in an office would be so to do.] *Poole v. Dicas*, 1 N. C. 649, 1 Scott, 600, is a case of the same description. There, a bill became due, and was left with a notary to demand payment; M., the notary's clerk, went out, returned, and, in one of the notary's books, into which the bill had been previously copied, wrote in the margin "*no effects*;" another clerk made a similar entry in another book, from M.'s dictation: all this was done in the regular course of business: the court held, that, after the death of M., the entry made by him was admissible to prove the dishonour of the bill. And TINDAL, C. J., said: "We think it admissible, on the ground that it was an entry made at the time of the transaction, and made in the usual course and routine of business, by a person who had no interest to misstate what had occurred." *[MAULE, J.* Your argument would make every banker's or tradesman's ledger evidence to prove every entry contained in it. The true ground upon which the cases you cite proceeded, was, that the entry and the act recorded by it were contemporaneous.] Here, the entry of the charge and the entry of the discharge are contemporaneous acts.

The accounts are admissible upon another ground, *viz.* that almost all of those which were rejected have a *quietus* attached, which operates as an admission by the lord, charging himself, and discharging the reeve. This was discovered since the trial, by comparing the faint traces remaining, with the rolls of other hundreds, in which the *quietus* was more perfect. [CRESSWELL, J. You can hardly have a new trial upon that ground.]

It is further submitted that these rolls possess a public character, which makes them evidence.

*The learned judge was clearly wrong in leaving the construction of the ancient grants to the jury. And, if there be any [504 variation introduced by the change of language in the evidences of title, they must be construed with reference to the lord's duty, to admit to the immemorial customary tenement.

The lord is not estopped by the form of the last entry, in passing which he acted ministerially only.

The lord claims the subsoil, subject to the right of the customary tenant of the *pastura*, in the surface. He claims also the trees and a sufficient portion of the surface, as well as of the subsoil, for their nourishment. If he is entitled to either of these, there should have been a verdict, *pro tanto*, for his lessee, the plaintiff.

COLTMAN, J. The first question in this case turns upon the meaning of the words "*pastura bosci et subbosci de Haidwood*," in the ancient documents that were given in evidence. The defendant starts with this circumstance in his favour, *viz.* that the enjoyment of the land, as far back as living memory goes, has, under this description, been of the nature and to the extent which he now claims. The modern usage is uniform, that the tenants, on admittance by the description of the "*pasture, wood, and underwood of Haidwood*," since the statutes requiring records, &c., to be written in the English language, have claimed and enjoyed the land itself, and not the pasturage only. It is impossible to suppose that the parties (a) did not at this time know what was the nature and extent of the enjoyment intended to pass by that description. And, if the modern entries are capable of being so construed, I think the terms of the ancient entries may admit of the same construction. Contemporaneous usage may be resorted to for the purpose of explaining any *uncertainty or ambiguity in ancient grants. I entirely [505 agree with my brother Manning, that the words of the old entries here,—*pastura bosci et subbosci*,—might mean the pasture of the wood and underwood only. But I think they are clearly also susceptible of a construction that will carry the *land* itself. That being so, evidence was offered, and received, to show, by contemporaneous (b) and uniform usage, how those words had been understood and dealt with: and, that evidence

(a) At Taunton, not at Winchester.

(b) *Quære*, the period to which this term is applied,—to the time when the lord converted the soil into bricks, and, by the agency of ancient customary officers of the manor, called woodwards,

being admitted, it then became a question for the jury. The evidence on the one side consisted of the reeves' accounts showing the receipt, by the lord of the manor, of profits in the woods and underwoods in question: and, on the other side, there was evidence of user inconsistent with the lord's claim to the land, and with the construction now sought to be put upon the ancient entries, by the lessor of the plaintiff. The documents having been admitted, it seems to me that the whole might properly be submitted to the jury, in order to lead them to the right construction of those words "*pastura bosci et subbosci*," in the ancient grant: and, considering the long and uninterrupted enjoyment of the land by those claiming under that grant, I think the jury would have come to an unreasonable conclusion, if they had found any other verdict than that which they did.

The next question is, whether the pipe-rolls of the manor which were offered in evidence on the part of *the lessor of the plaintiff, and which were rejected, were properly admissible. It has been contended, that, not only the charging part, but also the discharging part of the reeves' accounts which these rolls contained, were admissible: and for this the case of *Bullen v. Michel* is mainly relied upon,—where GIBBS, C. B., is reported to have said^(a) that "one side of the account,—the charging side,—will be evidence, because the reeve charges himself; and the discharging side will be evidence, *not only because it is part of the same account*, but because the bailiff admits the propriety of it: in one case, it is against the reeve to charge himself, and, in the other case, it is against the bailiff to allow his discharge." It is clear that what the lord chief baron^(a) there mainly relies on, is, the fact of the bailiff's admitting the correctness of the account. He did not sufficiently advert to the distinction between the production of the accounts in an action against the party himself, and using them as evidence against a third person.^(b) In the latter case the ground of admissibility is a special one; the reeve has no interest in speaking falsely, when he is charging himself; but it is obviously his interest to falsify the account *quoad* the discharging part of it.^(c) This matter

receiving an immemorial customary fee, cut the wood and underwood (in this manor all timber, as well as underwood, belonging to the customary tenant of the land,)—or to the later period when the sub-officer appointed by the patentee for life of the predecessor of the absent bishop, and acting as attorney of the customary tenant, had fraudulently, or carelessly, enlarged the customary estate, by a mistranslation?

^(a) It was the long-considered, written judgment of the court of Exchequer (GIBBS, C. B., WOOD, B., THOMPSON, B., and GRAHAM, B.), expressly recognised afterwards by THOMPSON when C. B., and by RICHARDS, B., and affirmed by the House of Lords. It is true that the affirmance in Dom. Proc. did not, like the recognition by THOMPSON, C. B., and RICHARDS, B., refer to the written, and then printed, judgment: but no disapprobation of any part of that judgment was expressed.

^(b) There is nothing in the report to show that the court took into its consideration the effect of the production of the account as against the accountant,—an inquiry wholly foreign to the question there argued.

^(c) See the observation of LITLEDALE, J., *supra*, 498. The decision on the trial at bar in *Rowe v. Brenton* was not noticed in the judgment in the principal case.

was considered in **Knight v. The Marquess of Waterford*, where ALDERSON, B., observes, with respect to *Bullen v. Michel*, that [*507 “the decision was right, without taking into consideration all the reasons given for it.” In that case, the learned baron expressly decided^(a) that the charging part of the account might be read, but not the discharging part: and I think that decision was right. Where the charging part of the account refers to the discharging part, it may be necessary to read the whole. So, where the latter contains anything explanatory of the former, that may render the whole account admissible. But that is not the case here.

A further ground upon which it was suggested that the accounts were admissible, was, that the entries purported to be made by the party in the course of his duty. That, however, was disposed of in the course of the argument, because the entries did not appear to have been made contemporaneously with the payments.

The next ground upon which the documents were contended to be receivable, was, that they contained admissions by the lord against his own interest, coming, as they did, from the lord's muniment-room. But it was not with that view that the documents were tendered at the trial: they were tendered simply as the reeve's accounts, in which the reeve charged himself. If it had been put at the trial on the ground of an admission by the lord, adverse to his own interest, that would have led to a totally different inquiry.

There is no ground for saying that these rolls were admissible as public documents.

*For these reasons, it seems to me that this rule ought to be [*508 discharged.

MAULE, J. I am of the same opinion. The alleged misdirection arises from the learned judge having left it to the jury to say, whether, taking the usage into consideration, the words “*pastura bosci et subbosci de Haidwood*,” in the original grant, were intended to pass the land. There was evidence, that, as far back as living memory could reach, the land had been claimed and enjoyed under that description.^(b) The words used in old copyhold admissions, which are usually the same age after age, have in the course of time become simply names like the names of persons or of places. It was quite competent to the parties originally to designate this interest which the evidence showed had been immemorially enjoyed, “*pastura bosci et subbosci*.” And I think the learned judge was quite right in leaving it to the jury as he did; and that their conclusion was just.

As to the rejection of evidence, the case stands thus: The documents

^(a) The decision, in which the learned baron, without hearing any argument on the point, summarily disposed of the deliberate judgment of the court of Exchequer in *Bullen v. Michel*, took place in a short conversation which occurred in the course of the argument, and had probably been forgotten long before the written judgment of the same learned judge, in which the point is not noticed, came to be prepared.

^(b) The last entry with that description, was in 1715.

in question were offered as accounts rendered by a reeve to his lord, in which the reeve charged himself. There was no suggestion at the trial that the account was admissible on the ground that the lord, by admitting the propriety of the account so rendered, had charged himself: and it would be manifestly unjust to allow that ground to be taken now, seeing that, if it had been so put then, it might have been explained. The question, then, is, whether items in that account, in which the reeve charges the lord, and not himself, are to be admitted as evidence, merely because there are items on the other side of the account that are admitted. The principle upon which entries and declarations by deceased persons *509] are held admissible, is *this:—As a general rule, declarations not upon oath, are not received: but an exception is made in favour of admissions, which, being against the interest of the party making them, it could not have been supposed would have been made, if contrary to the truth. That exception applies to the case of entries whereby a party charges himself with the receipt of money for which he has to account; but it manifestly does not apply to entries in discharge of the party making them. It may be that a person, in charging himself, makes a declaration which is not intelligible without looking at the other side of the account; and, in that case, recourse must necessarily be had to both sides. Such was the case of *Higham v. Ridgway*,—where an entry made by a man-midwife, who had delivered a woman of a child, of his having done so on a certain day, referring to his ledger, in which he had entered a charge for his attendance, which was marked “paid,” was held to be evidence upon an issue as to the age of such child at the time of its afterwards suffering a recovery. It could not be supposed that the accoucheur would have acknowledged the receipt of his fee, unless the thing had really happened; and he clearly had no interest in falsifying the fact. I entirely concur in the remark made by ALDERSON, B., in *Knight v. The Marquess of Waterford*, upon the judgment of GIBBS, C. B.,^(a) in *Bullen v. Michel*. There (in *Bullen v. Michel*), the question was as to the admissibility of certain items in accounts stated by the reeve of the abbey of Glastonbury, and allowed by the bailiff or steward. Those accounts were receivable upon a perfectly unquestionable ground, *viz.* the admission of the bailiff. The other ground adverted to by the chief baron,^(a)—that *510] the items of discharge formed part of the same account *with those by which the reeve charged himself, is, to say the least of it, extremely doubtful. I think, therefore, that the items of discharge in the accounts in question which were not referred to in, or necessary to explain, the items of charge, which were admitted and read, were properly rejected. The presumption that these entries are false, is at least as strong as the presumption that the others are true.

As to the suggestion that these accounts were admissible as part of the *res gestæ*, I do not feel it to be necessary to make any remark. Nor do

^(a) *Vide supra*, 506 (a).

I think they were receivable on the ground which makes public documents receivable. Upon the whole, the conclusion I have arrived at is, that the rejection of them was perfectly right.

The rejection of the evidence properly admitted, was, that, as far back as can now be inquired into, the land in question has passed by the same terms as it now passes by,—or by other terms less favourable to the possessor. I do not think that the circumstance that the lord might, at some very distant period, have enjoyed some small profit out of the woods of Haidwood, is at all inconsistent with the right of the copyholder to the soil,^(a) or that it ought to be permitted to outweigh all the other evidence in the cause. I think the verdict would clearly have been wrong, if found the other way.

*CRESWELL, J. I am entirely of the same opinion. I under-stand my brother *Manning* to found his claim to a new trial on this,—that the land in question was copyhold of the manor of Taunton Deane, and that by the admission of the tenant thereto a limited interest only was granted, *viz.* the pasturage, and not the land itself. He insists, that, although the language of the admission may seem to include the land, in truth it was not so intended; and that the lord had no power to make a new grant. A great many entries were read from the court-rolls of the manor, for the purpose of explaining what was meant by the words "*pastura bosci et subbosci de Haidwood*;" and contemporaneous evidence of the mode of enjoyment was also given. It has been insisted that the learned judge was wrong in putting this to the jury. But I apprehend the ancient grant was fairly susceptible of the construction now put upon it on the part of the defendant: the words might have been intended to describe the land itself, or the interest meant to be conveyed. And there is abundant authority to show that evidence of contemporaneous^(b) usage may be received for the purpose of explaining ambiguous terms in a grant. Thus, in *Wadley v. Bayliss*, 5 Taunt. 752, it was held that evidence of contemporaneous acts of the occupiers of the land, might be received to explain an ambiguous award of a road under an enclosure act. So, here, evidence of the course of enjoyment of the land under subsequent admissions in the same form,^(c) was clearly admissible, to explain what was meant by the original grant. The evidence showed, that, as far back as living memory extended, the custom-

(a) It is not necessary to the *purity* of a customary estate that it should have been always customarily *demised*. It is sufficient if it has been always customarily *demisable*. The mere possession and perception of profits by the lord for ever so long a period, might not, therefore, of itself, be very material, and, at all events, would not be conclusive, in the absence of any evidence that, at the time of the exercise of those acts of ownership on the part of the lord, the *pastura bosci et subbosci de Haidwood* was in the actual tenure of a customary tenant. But the existence of *immemorial* woodwards, receiving an *immemorial customary* fee for the superintendence of this wood, on behalf of the lord, is hardly reconcilable with the perpetual customary *demisability* of the wood.

(b) *Supra*, 505 (a).

(c) No objection could have been taken to such evidence, if it had been offered, which was not done

ary tenants admitted to the tenements in question, enjoyed the land itself: and we must presume that they so enjoyed it at the time of the *512] passing of the statutes *changing the language of records. There is every reason for believing that the enjoyment was the same in ancient as in more modern times.

But it is said that the learned judge should not have left it to the jury to say what was the meaning of the terms used in the original grant, but should have taken upon himself to construe it,—inasmuch as that course deprived the plaintiff of the opportunity of tendering a bill of exceptions.^(a) In substance, the learned judge directed the jury to find for the defendant if they thought that the original grant, explained by the evidence of usage, was intended to convey the land. If the counsel for the plaintiff meant to insist that evidence of usage was not admissible, there was nothing to prevent them from tendering a bill of exceptions.

With respect to the question of evidence, I entirely agree with what has fallen from my brother COLTMAN and my brother MAULE. The principle upon which entries made by deceased stewards and other persons are held to be admissible, is, that they are admissions against the interest of the parties making them, and are therefore to be presumed to be true.^(b) Here, the reeve's accounts were admitted to the extent to which he purported to charge himself. But then it was said, that, the reeve's admissions of the receipt of money having been received, the accounts were also to be looked at for the purpose of seeing how he had disposed of the money. That, however, is a totally different matter. The statements on the one side and on the other may be so blended together that the one cannot be read without the other: but it does not follow, that, in all cases, the entire account must be read. If the discharging part of the account be necessarily resorted to for the purpose *513] of explaining the charging part, it *may be evidence. The manner in which the reeve disposed of money that had come to his hands, clearly was not necessary to explain his admission of its receipt. The circumstance of the expenditure being said to have been made in respect of the same wood of Haidwood, and so part of the *res gestæ*, clearly makes no difference in principle.

With respect to the custody from which these documents came,—it is enough to say that that was not a ground urged at the trial, and therefore it cannot avail now.

It has also been said, that, inasmuch as some of these accounts contain a *quietus*,—a fact that had not been discovered at the time of the trial.—they were admissible as declarations by the lord against his own interest. If that had been proved at the trial, and their admissibility had been

(a) If the objection had taken *this* form, it would have been met by the fact that a bill of exceptions was tendered.

(b) *Vide infra*, 497, 498.

put upon that ground, possibly they would not have been objected to. At the best, the plaintiff is now in the situation of having discovered new evidence; as to which there are two inflexible rules,—first, that the evidence so discovered be material evidence, — secondly, that it be of such a nature as that the party could not with reasonable diligence have obtained it before. Now, here, the rolls were in the possession of the plaintiff himself.(a) He is, therefore, not entitled to any indulgence.

As to these documents being admissible on the ground of their possessing a public character, there is neither principle nor authority for that.

Upon the whole, I think that the direction was right, *that the rejected evidence was properly rejected, and that the jury came [*514 to a right conclusion.

V. WILLIAMS, J. I am of the same opinion. As to the misdirection, —I understand the jury to have found that “*pastura bosci et subbosci de Haidwood*” was, in effect, the name by which the *land itself* was designated in the original grant.(b) It was the same as if they had found that it was known and described as “*Haidwood-Grove pasture.*” And I think that the case was properly left to the jury, and that they were fully warranted in coming to that conclusion.

As to the rejection of evidence, I am of opinion that the ruling (c) in *Knight v. The Marquess of Waterford*, ought to govern this case. It seems to me that the doctrine laid down by the court of Exchequer in *Davies v. Humphries*, upon the authority of *Higham v. Ridgway* and *Doe v. Robson*,—that “the entry of a payment against the interest of the party making it, is to have the effect of proving the truth of other statements contained in the same entry, and connected with it,”—has gone quite far enough. I, for one, do not feel inclined to carry it any further.

For these reasons, I concur with the rest of the court in thinking that this rule ought to be discharged. Rule discharged.

(a) The rolls were, *in fact*, in the possession of the lessor of the plaintiff, he happening to be grantee for life of the office of clerk of the castle of Taunton, although no evidence to that effect was given. What appeared at the trial, was, that the lessor of the plaintiff was the alienee in fee of that part of the manor of Taunton Deane which was situate within the hundred of Holway.

(b) The objection made, was, that such partial views of the evidence had been presented to the jury, as necessarily led them to that conclusion, whether warranted by the *entire* evidence or not.

(c) *Vide supra*, 507.

*ROBERT SMITH, Secretary to THE NEW BRITISH IRON COMPANY, v. WILLIAM KENRICK. Feb. 14. [*515

Seemle, that it is the right of each of the owners of adjoining mines,—where neither mine is subject to any servitude to the other,—to work his own mine in the manner which he deems most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine; so long as such prejudice does not arise from the negligent or malicious conduct of his neighbour.

The plaintiff was possessed of a colliery, called A., and the defendant of a colliery adjoining, called B., which was upon a higher level than A. Before the defendant became possessed of colliery B., one Jones, who then held it,—but between whom and the defendant it was found, as a fact, that there was not any privity, either of contract or of estate,—made three large holes called thyrlings, in and through a vertical seam of coal, part of colliery A., and forming a barrier between the chambers in colliery A. and those in colliery B. At the time the defendant first became the occupier of B., there was a large subterranean body of water therein, which communicated with, and was fed by, springs in the neighbourhood. This water was on a higher level than the chambers of B., and separated from them by a thick horizontal bar of coal which was part of colliery B. The chambers of B. were on a higher level than the thyrlings above mentioned, and the thyrlings were on a higher level than the chambers of A. : and, consequently, the effect of removing the horizontal bar of coal in B. necessarily was, that the water above mentioned would, of itself, flow into the chambers of B., and that a large portion thereof would also flow on of itself from the chambers of B., through the thyrlings, into the chambers of A. The defendant, knowing that the thyrlings were then open, and that the effect of removing the horizontal bar of coal in B. would be as above stated, nevertheless did remove the same, *for the purpose of obtaining the coal, and so working his mine in the manner most advantageous to himself.* In consequence of the removal of this horizontal bar of coal in B., the water flowed into the chambers of B., and thence, through the thyrlings, into the chambers of A., and inundated the same:—

Held, that the defendant was not responsible for the injury so occasioned.

THIS was an action on the case, in which The New British Iron Company,—who are incorporated by act of parliament 7 & 8 Vict. c. xxx., and sue by their secretary and registered public officer, were the real plaintiffs,—to recover damages against the defendant for wrongfully *516] **omitting to prevent water from flowing through his mine into the mine of the company; and also for wrongfully causing water to flow from his mine into the mine of the company.*

The first count of the declaration stated, that, on the 1st of January, 1840, there were, and thence during all the time in that count mentioned, there had been, and still were, two collieries, with the appurtenances, respectively situate under ground, and adjoining one another, at the parish of Ruabon, in the county of Denbigh,—one of the said collieries being a colliery called the Plas Bennion Colliery, and the other of the said collieries being a colliery called the Avon Eitha Colliery, and the said colliery called the Avon Eitha Colliery, being a colliery situate on a higher level than the said colliery called Plas Bennion, and both the collieries being collieries which, during all that time, contained mines of coal and other minerals, and the said colliery called the Plas Bennion Colliery being a colliery which, during all that time, contained divers and very many chambers, which had been theretofore formed under ground in the said colliery called Plas Bennion, by excavations made therein for the purpose of extracting coal and other minerals, from the said mines therein, and divers and very many of the said chambers in the said colliery called Plas Bennion being during all that time bounded, at the eastern extremity of the said colliery called Plas Bennion, by part of a vein or seam of coal of and belonging to, and parcel of, and forming and being the eastern extremity of, the said colliery called Plas Bennion, and the said part of the said vein or seam of coal so forming and being the eastern extremity of the said colliery called Plas Bennion:

being a part of the said colliery called Plas Bennion which during all that time separated the said chambers so formed under ground in the said colliery called Plas Bennion from, and formed a wall or *barrier between them and certain other chambers which during all [*517 that time were in the said colliery called Avon Eitha,—the last-mentioned chambers, so being in the said colliery called Avon Eitha, being chambers which theretofore had been formed in the said colliery called Avon Eitha by excavations theretofore made therein for the purpose of extracting coal from the veins or seams of coal in the said colliery called Avon Eitha: That, on the day and year last aforesaid, the said company became and were, and thence always before and up to and at the times of the committing of the grievances, and of the happening of the damage, thereafter in that count mentioned, and at and during all the times thereafter in that count mentioned, continued to be and were, and still remained, possessed of the said colliery called Plas Bennion: That, while the said company were so possessed of the said colliery called Plas Bennion, to wit, on the 1st of January, 1840, certain persons, to wit, Evan Jones and divers and very many other persons, were, and thence up to a certain other day, to wit, the 2d of December, 1844, continued to be, and were, possessed of the said colliery called Avon Eitha: That, while the said Evan Jones and the said other persons were so possessed of the said colliery called Avon Eitha, and while the said company were so possessed of the said colliery called Plas Bennion, to wit, on the 1st of January, 1844, and on divers and very many other days and times between that day and the time when the said Evan Jones and the said other persons ceased to be possessed of the said colliery called Avon Eitha, the said Evan Jones and the said other persons so possessed of the said colliery called Avon Eitha, with force and arms, and against the peace of our lady the Queen, unlawfully and injuriously broke and entered the said colliery called Plas Bennion, and made divers, to wit, three large holes, called thyrlings, in the said *vein or seam of [*518 coal, so being part of the said colliery called Plas Bennion, and forming the eastern extremity thereof, and also extracted and detached from the said seam or vein of coal, so forming the eastern extremity of the said colliery called Plas Bennion, divers and very many large quantities of the coal thereof, and whereof the same consisted: That, after the making of the said holes, to wit, on the day and year last aforesaid, the said Evan Jones and the said other persons ceased to be possessed of the said colliery called Avon Eitha; and thereupon, afterwards, to wit, on the day and year last aforesaid, the defendant became, and thence always before and up to and at the time of the committing of the grievances and of the happening of the damage thereafter in that count mentioned, and at all the times and during all the time thereafter in that count mentioned, continued to be and was, and still remained, possessed of the said colliery called Avon Eitha: That, at the said time when

the defendant so became possessed of the said colliery called Avon Eitha, and thence continually up to and at all the times and during all the time thereafter in that count mentioned, the said quantities of coal so extracted and detached from the said part of the said vein or seam of coal, so forming the eastern extremity of the said colliery called Plas Bennion, remained and were so extracted and detached therefrom, and the said holes so made in the said part of the said vein or seam of coal of and belonging to the said colliery called Plas Bennion, and forming the eastern extremity thereof, remained and were so made in the said colliery called Avon Eitha, and were not in any manner stopped up or filled up : * That a long time before and at the respective times of the said company, and the said Evan Jones and the said other persons, and of the defendant's, becoming respectively possessed of the said collieries respectively as *519] ^{aforesaid, and thence up to and at the time of the committing} of the grievances and of the happening of the damage thereafter in that count mentioned, and at the times and during all the time thereafter in that count mentioned, there was a large subterranean body or accumulation of water, of great depth and extent, lying and being on a higher level than the said collieries respectively called Plas Bennion and Avon Eitha, and being nearer to the said colliery called Avon Eitha than to the said colliery called Plas Bennion,—the said colliery called Avon Eitha lying between the said body or accumulation of water and the said colliery called Plas Bennion,—the said body or accumulation of water having at all times before and up to and at the time when a passage for the same into the said colliery called Avon Eitha was opened and formed in the manner thereafter in that count mentioned, being separated from and kept out of the said colliery called Avon Eitha, by part of a vein or seam of coal, and by other substances interposed and lying and being between the said colliery called Avon Eitha and the said body or accumulation of water : That, at all times after the committing of the said acts by the said Evan Jones and the said other persons so possessed of the said colliery called Avon Eitha, and before and at the time when the defendant cut and removed, in the manner thereafter in that count mentioned, from the said part of the said vein or seam of coal and other substances so separating the said colliery called Avon Eitha from, and forming a barrier between it and the said body or accumulation of water, and thence continually up to and at the time when a passage for the said water into the said colliery called Avon Eitha was opened and formed, in the manner thereafter in that count mentioned, the said colliery called Plas Bennion, and the chambers thereof, were, by reason of the said acts so committed by the *said *520] Evan Jones and the said other persons, and by reason of the position of the said body or accumulation of water in relation to the said collieries called Avon Eitha and Plas Bennion respectively, and by reason of the position of the said colliery called Avon Eitha in rela

tion to the said colliery called Plas Bennion, liable and likely to be inundated, in the event of a passage for the said body or accumulation of water being opened or formed in the said part of the said vein or seam of coal and the said other substances so separating the same from the said colliery called Avon Eitha, by the said water descending and pouring down through such passage into the said colliery called Avon Eitha, and thence flowing through the said holes, and penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, into the said colliery called Plas Bennion, and the said chambers thereof: That, but for the said holes, and but for the detaching and extracting of the said coals from the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, as it was before the making of the said holes, and before the detaching and extracting of the said coal therefrom, would at all times after a passage was opened and formed for the said water into the said colliery called Avon Eitha, in the manner therein-after in that count mentioned, have formed a barrier sufficient to prevent, and which would have prevented, the water,—which was thereafter in that count mentioned to have run and flowed into the said colliery called Avon Eitha, and thence to have flowed through the said holes, and to have penetrated and permeated through the said part of the said vein or seam of coal *so forming the eastern extremity of the said colliery called Plas Bennion, into the said colliery called Plas Bennion, [*521 and the chambers thereof,—from so flowing through the said holes, and from so penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Avon Eitha: that, of all the premises the defendant,—before and at the times when the defendant cut and removed, in the manner thereafter in that count mentioned, the coal and other substances from the said part of the said vein or seam of coal so separating the said colliery called Avon Eitha from, and forming a barrier between it and the said body or accumulation of water, and at all the times, and during all the time, thereafter in that count mentioned, and always,—had notice and knowledge: That, by reason of the premises thereinbefore in that count mentioned, the defendant of right ought to have refrained from committing the grievances thereafter in that count mentioned: Yet, that the defendant, well knowing the premises, but, contriving and intending to injure the said company, afterwards, and after the said holes had been so made in the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, and after the said coals had been so extracted and detached therefrom, and while the defendant was possessed of the said colliery called Avon Eitha, and while the said company were possessed of the said colliery

called Plas Bennion, and before the commencement of this suit, to wit, on the 1st of January, 1845, and on divers and very many other days and times between that day and the commencement of this suit, while the said holes remained and were in the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, and after the said coal had *been so detached and extracted *522] therefrom, and while the defendant was possessed of the said colliery called Avon Eitha, and while the said company was possessed of the said colliery called Plas Bennion, wrongfully, unlawfully, improperly and injuriously cut and removed away from the said part of the said vein or seam of coal and the said other substances so separating the said body or accumulation of water from the said colliery called Avon Eitha, and forming a barrier between the same and the said body or accumulation of water, divers and very many large quantities, to wit, 100,000 tons, of the said part of the said vein or seam of coal and other substances so separating the said colliery called Avon Eitha from, and forming a barrier between it and the said body or accumulation of water; whereby, afterwards, to wit, on the day and year last aforesaid, a passage for the said water was opened and formed, and thence continually for a long space of time, to wit, thence to the time of this suit, continued open, through the said part of the said vein or seam of coal and other substances so separating the said colliery called Avon Eitha from, and forming a barrier between it and the said body or accumulation of water, into the said colliery called Avon Eitha: That the defendant, well knowing the premises, and contriving and intending to injure the said company, at the said time of the cutting and removing of the said coal and other substances from the said part of the said vein or seam of coal and other substances so separating the colliery called Avon Eitha from, and forming a barrier between it and the said body or accumulation of water, and thence continually up to and at the time of the said passage for the said water being opened and formed through the said last-mentioned vein or seam of coal and other substances, and thence continually up to and at the several times thereafter in that count mentioned, wrongfully, carelessly, *523] *unlawfully, negligently, injuriously, and improperly worked, managed, and kept the said colliery called Avon Eitha, and wrongfully, unlawfully, and improperly, carelessly, and injuriously neglected to take reasonable and proper means to prevent, and wrongfully and improperly, unlawfully, and injuriously neglected to prevent, and did not prevent, the said water which was thereafter in that count mentioned to have flowed from the said colliery called Avon Eitha, into the said colliery called Plas Bennion, through the said holes, and which was thereafter in that count mentioned to have penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern boundary of the said colliery called Plas Bennion, in the manner thereafter in that count mentioned, from so flowing through the said holes,

and so penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern boundary of the said colliery called Plas Bennion, as thereinbefore mentioned: That, by means of the several premises, afterwards, to wit, on the day and year last aforesaid, and on divers and very many other days between that day and the commencement of this suit, divers large quantities of the said body or accumulation of water ran and flowed into the said colliery called Avon Eitha, through the said passage so opened and formed in the said part of the said vein or seam of coal and other substances which so, before the forming and opening of the said passage, separated the said colliery called Avon Eitha from, and formed a barrier between it and the said body or accumulation of water; and divers large quantities of the said water which so flowed through the said passage into the said colliery called Avon Eitha, ran and flowed from the said colliery called Avon Eitha into the said colliery called Plas Bennion, through the said holes so being in the said *part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion; and divers [*524 other large quantities of the said water which so flowed through the said passage into the said colliery called Avon Eitha, penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, into the said colliery called Plas Bennion, and the said chambers therein; by reason and means whereof * * the said colliery called Plas Bennion, and the chambers thereof, were, afterwards, to wit, on the days and times last aforesaid, inundated and filled by and with the said water which so flowed through the said holes, and penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion; and by reason thereof the said company, afterwards, and before the commencement of this suit, to wit, on the several days and times last aforesaid, and thence always up to the time of the commencement of this suit, were hindered and prevented from digging and obtaining coal from the mines of coal then being in and parcel of the said colliery called Plas Bennion, and from enjoying and working the said colliery called Plas Bennion, in so extensive, complete, beneficial, and convenient a manner as they otherwise might and would have done; and, by reason of the premises, afterwards, and before the commencement of this suit, to wit, on the 1st of January, 1845, and on divers and very many other days and times after the said colliery called Plas Bennion, and the chambers thereof, had been so inundated and filled with water, and before the commencement of this suit, to wit, at the several days and times last aforesaid, the said company were forced and obliged to, and at those times did, pump from the said colliery called Plas Bennion, and the said chambers thereof, the *said water, wherewith the same had been so inundated, and, in so doing, were [*525 put to great expense, to wit, to the amount of 2000*l*.

The second count was similar to the first, as far as the *asterisk* in p. 518: it then proceeded to state—That, by reason of the committing of the said acts by the said Evan Jones, and the said other persons so possessed of the said colliery called Avon Eitha in that count mentioned, the said colliery called Plas Bennion in that count mentioned, and the said chambers so formed therein, were at all times after the committing of the said acts by the said Evan Jones and the said other persons, rendered liable to be, and had at all times after the committing of the said acts been liable to be, and still by reason of the said acts were liable to be, inundated, on occasions of water being introduced into or being in the said colliery called Avon Eitha in that count mentioned, by such water flowing through the said holes, and penetrating and permeating through the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned: That, but for the said holes, and but for the detaching and extracting of the said coals from the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, as it was before the making of the holes, and before the detaching and extracting of the said coal therefrom, would, at the times when water was introduced into the said colliery called Avon Eitha in that count mentioned, as thereafter in that count mentioned, have formed a barrier sufficient to prevent, and which would have prevented, the water which was thereafter mentioned to have been introduced into the *said colliery called Avon Eitha in that count *526] mentioned, and thence to have flowed through the said holes, and to have penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, into the said colliery called Plas Bennion in that count mentioned, from so flowing through the said holes, and penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned: That, by reason of the defendant's possession of the said colliery called Avon Eitha in that count mentioned, and by reason of the position thereof in relation to the said colliery called Plas Bennion in that count mentioned, and by reason of the matters and things in that count mentioned, the defendant, during all the time while he was possessed of the said colliery called Avon Eitha in that count mentioned, of right ought to have prevented, and still of right ought to prevent, the water from time to time introduced by the defendant into, and caused by the defendant to be in, the said colliery called Avon Eitha in that count mentioned, and the said chambers thereof, during the defendant's possession thereof, from flowing through the said holes into the said colliery called Plas Bennion in that count mentioned,

and the said chambers thereof, and from penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, and the chambers thereof: That, of all the premises, the defendant always had notice and knowledge: Yet that the defendant, well knowing the premises, but contriving and intending to injure the said company, after the said holes had been so made in the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called *Plas Bennion in that count mentioned, and after the said coal had been so extracted and detached from the said part of the said vein or seam of coal forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, and while the said company were possessed of the said colliery called Plas Bennion in that count mentioned, to wit, always from the said time of the defendant's so becoming possessed of the said colliery called Avon Eitha in that count mentioned, to the time of the commencement of this suit, wrongfully, maliciously, unlawfully, and injuriously introduced into, and caused to be in, the said colliery called Avon Eitha, in that count mentioned, and the chambers thereof, divers and very many large quantities of water: and the defendant, further contriving, and wrongfully and maliciously intending to injure the said company, afterwards, and after the said holes had been so made, and after the said coal had been so extracted and detached from the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, and while the defendant was so possessed of the said colliery called Avon Eitha in that count mentioned, and while the said company were so possessed of the said colliery called Plas Bennion in that count mentioned, and while the said holes so remained and were continued by the defendant, and before the same had been stopped up, and after the said water had been so introduced into, and while it was in, the said colliery called Avon Eitha in that count mentioned, and the chambers so formed in the said colliery called Avon Eitha in that count mentioned, to wit, on the said several days and times when the said water was so introduced into, and while it was in, the same chambers, and from those times respectively to the time of the commencement of this suit, wrongfully, unlawfully, maliciously, and *injuriously omitted to prevent the said water so introduced into and being in the said colliery called Avon Eitha in that count mentioned, and the said chambers so formed therein, from flowing from the said colliery called Avon Eitha in that count mentioned, and the chambers thereof, through the said holes, into the said colliery called Plas Bennion in that count mentioned, and the chambers thereof, and from penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, into the said colliery called Plas Bennion in that count mentioned, and the cham-

bers thereof; and that, by means and in consequence of the premises in that count mentioned, to wit, on the several days and times when the said water had been so introduced into, and was in, the said colliery called Avon Eitha in that count mentioned, and the said chambers so formed therein, and on divers and very many other days and times after those days and times respectively, and before the commencement of this suit, divers large quantities of the water so introduced into, and being in, the said colliery called Avon Eitha in that count mentioned, and the said chambers so being therein, flowed from the said colliery called Avon Eitha in that count mentioned, and the said chambers therein, through the said holes so being in the said vein or seam of coal, so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, into the said colliery called Plas Bennion in that count mentioned, and into the said chambers so made in the said colliery called Plas Bennion in that count mentioned; and divers other large quantities of the said water so introduced into and being in the said colliery called Avon Eitha in that count mentioned, and the chambers thereof, penetrated *529] and permeated through the said part of the same vein *or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, into the said colliery called Plas Bennion in that count mentioned, and the chambers so formed therein; and that the defendant, further contriving, and wrongfully and maliciously intending to injure the said company, afterwards and after the said holes had been so made as aforesaid, and after the said coal had been so extracted and detached from the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in that count mentioned, and while the defendant was so possessed of the said colliery called Avon Eitha in that count mentioned, and while the said company was possessed of the said colliery called Plas Bennion in that count mentioned, and before the commencement of this suit, to wit, on the several days and times last aforesaid, wrongfully, unlawfully, maliciously, and injuriously caused and procured divers other very large quantities of the said water so introduced into, and being in, the said colliery called Avon Eitha in that count mentioned, and the chambers thereof as aforesaid, to flow, and the said last-mentioned quantities of the said water, at those times were, on those days and times, thereby made to flow, and, on those days and times, did flow, through the said holes into the said colliery called Plas Bennion in that count mentioned, and the said chambers thereof; and wrongfully, unlawfully, maliciously, and injuriously caused and procured divers other large quantities of the said water so introduced into and being in the said colliery called Avon Eitha in that count mentioned, and the said chambers thereof, to penetrate and permeate, and the said last-mentioned quantities of water, at the said last-mentioned days and times, did penetrate and permeate, through the said vein or seam of coal so forming the eastern extremity

of the said colliery called *Plas Bennion in that count mentioned, into the said colliery called Plas Bennion in that count mentioned, [*530 and the said chambers so formed therein: That, by means thereof, &c., as in the first count from the double asterisk in p. 524, to the end.

The defendant pleaded,—first, not guilty to the whole declaration.

Secondly, thirdly, fourthly, fifthly, sixthly, seventhly, and eighthly, pleas respectively putting in issue the several allegations in the first count.

Ninthly, that the said chambers in the said colliery called Plas Bennion in the second count mentioned, were not bounded at the eastern extremity of the said colliery by part of a vein or seam of coal of and belonging to, and parcel of, and forming and being the eastern extremity of the said last-mentioned colliery called Plas Bennion, nor was the said part of the said vein or seam of coal a part of the said last-mentioned colliery called Plas Bennion which separated the said chamber so formed under ground in the said last-mentioned colliery called Plas Bennion from, or formed a barrier between them and the said other chambers which were in the said colliery called Avon Eitha, in manner and form as in the said second count alleged, &c.

Tenthly, that, while the said Evan Jones and the said other persons were so possessed of the said last-mentioned colliery called Avon Eitha, and while the said company were so possessed of the said last-mentioned colliery called Plas Bennion, the said Evan Jones and the said other persons so possessed of the said last-mentioned colliery called Avon Eitha, did not break or enter the said last-mentioned colliery called Plas Bennion, or make therein the said holes called thyrlings, or any of them, in the said vein or seam of coal so being part of the said last-mentioned colliery called Plas Bennion, and forming the eastern extremity thereof, nor *extract or detach from the said vein or seam of coal so [*531 being a part, and forming the eastern extremity of the said colliery called Plas Bennion, and forming the said wall or barrier, the said large quantities, or any part, of the coal thereof, and whereof the same consisted, in manner and form as in the said second count is alleged, &c.

Eleventhly,—except as to so much of the second count as charged the defendant with having wrongfully, unlawfully, maliciously, and injuriously caused and procured the said quantities of water so introduced into and being in the said colliery called Avon Eitha in the said second count mentioned, and the chambers thereof, to flow, and with having thereby made the same to flow, through the said holes into the said colliery called Plas Bennion in the same count mentioned, and the chambers thereof, and with having wrongfully, maliciously, and injuriously caused and procured the said other quantities of the said water so introduced into and being in the last-mentioned colliery called Avon Eitha, and the said chambers thereof, to penetrate and permeate through the said vein or seam of coal into the last-mentioned colliery called Plas Bennion, and the said chambers so formed therein, as in the second count alleged,—

that, by reason of the committing of the said acts by the said Evan Jones and the said other persons so possessed of the said last-mentioned colliery called Avon Eitha, the said colliery called Plas Bennion in the second count mentioned, and the said chambers so formed therein, were not, after the committing of the said acts by the said Evan Jones and the said other persons, rendered liable to be, nor were they by reason of the said acts liable to be, inundated on occasions of water being introduced into or being in the said colliery called Avon Eitha in the said second count mentioned, by such water flowing through the said holes, and *532] penetrating *and permeating through the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in the said second count mentioned, in manner and form as in the said second count was alleged, &c.

Twelfthly,—except as in the introductory part of the eleventh plea,—that, but for the said holes, and but for the detaching and extracting of the said coal from the said part of the said vein or seam of coal so forming the eastern extremity of the said last-mentioned colliery called Plas Bennion in the said second count mentioned, the said part of the said vein or seam of coal so forming the eastern extremity of the said last-mentioned colliery, as it was before the making of the said holes, and before the detaching and extracting of the said coal therefrom, would not, at the times when water was introduced into the said colliery called Avon Eitha in the said second count mentioned, as therein mentioned, or at any or either of such times, have formed a barrier sufficient to prevent, nor would the same have prevented, the water, or any part thereof, in the said second count mentioned to have been introduced into the said last-mentioned colliery called Avon Eitha, and thence to have flowed through the said holes, and to have penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern extremity of the said last-mentioned colliery called Plas Bennion, into the same colliery, from so flowing through the said holes, or penetrating or permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the same colliery, in manner and form as therein alleged, &c.

Thirteenthly,—except as in the introductory part of the eleventh plea,—that the defendant, by reason of his possession of the said colliery *533] called Avon Eitha *in the said second count mentioned, and by reason of the position thereof in relation to the said colliery called Plas Bennion in the same count mentioned, and by reason of the matters and things in that count mentioned, or by reason of any or either of the said matters, ought not of right, during all the time, or any of the time, while he was possessed of the said last-mentioned colliery called Avon Eitha, to have prevented the water from time to time introduced by him, the defendant, into, or caused by him to be in, the said last-mentioned colliery called Avon Eitha, or the said chambers thereof, during his, the

defendant's, possession thereof, from flowing through the said holes, into the said last-mentioned colliery called Plas Bennion, or the said chambers thereof, or from penetrating or permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said last-mentioned colliery called Plas Bennion, or the chambers thereof, in manner and form as in the said second count alleged, &c.

Fourteenthly, that the defendant had not notice or knowledge of all or any of the premises in the said second count in that behalf mentioned, in manner and form as therein alleged, &c.

Fifteenthly (to both counts), that, before the commencement of this suit, to wit, on the 4th of June, 1845, the plaintiff, being then the secretary of the said New British Iron Company, the said company did, in the name of the now plaintiff, as such secretary, and for and on behalf of the said company, bring and commence a former action on the case against the now defendant, in this court here, before, &c.; and, the defendant having duly appeared in this court to the said action, the said company, in the name of the plaintiff, as such secretary as aforesaid, and on behalf of the said company, afterwards, on the 24th of October, 1845, duly declared in the said former action in this court against *the now defendant, for the committing of so much of the same [*534 grievances mentioned and complained of by the plaintiff, as such secretary as aforesaid, in his declaration in this present suit, and laid the damages of the said company in the said declaration in the said former action, by reason of the said grievances therein mentioned, at 5000*l.*; that, after the said company, in the name of the plaintiff, declared in the said former action as aforesaid, that is to say, on the 30th of January, 1846, the now defendant duly pleaded in this court in and to the said former action [payment into court of 70*l.*]; that the plaintiff, as such secretary as aforesaid, took the said 70*l.* out of court, &c.; and that the defendant afterwards, to wit, on, &c., paid to the said company 22*l.* 17*s.* for costs, &c.

The plaintiff joined issue on the first fourteen pleas, and replied to the last, so far as the same related to the second count, (a) that, by reason of anything in the said last plea alleged, he ought not to be barred from having or maintaining his aforesaid action thereof, for and on behalf of the said company, against the defendant, in respect of the grievances in the second count mentioned, because he said that the plaintiff, for and on behalf of the said company, issued his writ in this suit, so far as it related to the grievances in the second count mentioned, and declared thereupon, not for the grievances for the committing of which the said company, in the name of the plaintiff, as such secretary as aforesaid, and on behalf of the said company, declared against the defendant in the said former action,—and in satisfaction and discharge of the damages sustained by the

(a) There was a similar new assignment to the last plea so far as it related to the first count, re-asserting the cause of complaint in that count.

said company in respect of which last-mentioned grievances up to the time
*535] when the said plea in the said former *action was pleaded, he, the
plaintiff, so accepted and took out of court the said sum of 70*l.*,—
but for that the defendant, contriving and intending to injure the company,
after the said holes in the second count mentioned had been so made in
the said part of the said vein or seam of coal so forming the eastern
extremity of the said colliery called Plas Bennion in the second count
mentioned, and after the said coal had been so extracted and detached
from the said part of the said vein or seam of coal in the second count
mentioned, forming the eastern extremity of the said colliery called Plas
Bennion, in the second count mentioned, and while the defendant was
possessed of the said colliery called Avon Eitha, in the said second count
mentioned, and while the said company were possessed of the said colliery
called Plas Bennion in the second count mentioned, and after the plead-
ing of the said plea in the said former action, and at the said time when,
&c., in the second count in that behalf mentioned, to wit, always from
the said time of the defendant's so becoming possessed of the said colliery
called Avon Eitha, in the second count mentioned, to the time of the
commencement of this suit, wrongfully, maliciously, unlawfully, and
injuriously *introduced into and caused to be introduced in*, the said col-
liery called Avon Eitha, in the second count mentioned, and the cham-
bers thereof, divers and very many large quantities of water: That the
defendant further contriving, and wrongfully and maliciously intending
to injure the said company, afterwards, and after the said holes in the
second count mentioned had been so made, and after the said coal had
been so extracted and detached from the said part of the said vein or
seam of coal so forming the eastern extremity of the said colliery called
Plas Bennion, in the second count mentioned, and while the defendant
was so possessed of the said colliery called Avon Eitha, in the second
*536] count *mentioned, and while the said company were so possessed
of the said colliery called Plas Bennion, in the second count men-
tioned, and while the said last-mentioned holes so remained and were
continued by the defendant, and before the same had been stopped up,
and after the said water had been so introduced into, and while it was in,
the said colliery called Avon Eitha, in the second count mentioned, and
the chambers so formed in the said colliery called Avon Eitha, in the
second count mentioned, and after the pleading of the said plea in the said
former action, and at the said times when, &c., in the second count in that
behalf mentioned, to wit, on the said several days and times when the said
water was so introduced into, and while it was in, the same chambers, as
thereinbefore mentioned, and from those times respectively to the time of
the commencement of this suit, wrongfully, unlawfully, maliciously, and
injuriously *omitted to prevent* the said water so introduced and being in
the said colliery called Avon Eitha in the second count mentioned, and
the said chambers so formed therein, from flowing from the said colliery

called Avon Eitha in the second count mentioned, and the chambers, thereof, through the said holes, into the said colliery called Plas Bennion, in the second count mentioned, and the chambers thereof, and from penetrating and permeating through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion in the second count mentioned, into the said colliery called Plas Bennion, in the second count mentioned, and the chambers thereof: That, by means and in consequence of the premises thereinbefore, and in the second count mentioned, after the pleading of the said plea in the said former action, and at the said times when, &c., in the second count in that behalf mentioned, to wit, on the several days and times when the said water had *been so introduced into and was in the said colliery called Avon Eitha, in the second count mentioned, and the said chambers so [*537 formed therein, and on divers and very many other days and times after those days and times respectively, and before the commencement of this suit, divers large quantities of the water, so introduced into, and being in, the said colliery called Avon Eitha, in the second count mentioned, and the said chambers so being therein, flowed from the said colliery called Avon Eitha, in the second count mentioned, and the said chambers therein, through the said holes so being in the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, into the said colliery called Plas Bennion, in the second count mentioned, and into the chambers so made in the said colliery called Plas Bennion, in the second count mentioned; and divers other large quantities of the said water so introduced into and being in the said colliery called Avon Eitha, in the second count mentioned, and the chambers thereof, penetrated and permeated through the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, into the said colliery called Plas Bennion, in the second count mentioned, and the chambers so formed therein: That the defendant, further contriving, and wickedly and maliciously intending to injure the said company, afterwards, and after the said holes had been so made as aforesaid, and in the second count mentioned, and after the said coal had been so extracted and detached from the said part of the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, and while the defendant was so possessed of the said colliery called Avon Eitha, in the second count mentioned, and while the said company *were possessed of the said colliery called Plas Bennion, in the second count mentioned, and before the [*538 commencement of this suit, and after the pleading of the said plea in the said former action, and at the said times, when, &c., in the second count in that behalf mentioned, to wit, on the several days and times last aforesaid, wrongfully, unlawfully, maliciously, and injuriously *caused and procured* divers other large quantities of the said water, so

introduced into and being in the said colliery called Avon Eitha, in the second count mentioned, and the chambers thereof as aforesaid, to flow, and the said last-mentioned quantities of the said water at those times were in those days and times thereby made to flow, and on those days and times did flow, through the said holes, into the said colliery called Plas Bennion, in the second count mentioned, and the said chambers thereof, and wrongfully, unlawfully, maliciously, and injuriously *caused and procured* divers other large quantities of the said water so introduced into and being in the said colliery called Avon Eitha in the second count mentioned, and the said chambers thereof, to penetrate and permeate, and the said last-mentioned quantities of water, at the said last-mentioned days and times, did penetrate and permeate, through the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, into the said colliery called Plas Bennion, in the second count mentioned, and the said chambers so formed therein: That, by means thereof, the said colliery called Plas Bennion, in the second count mentioned, and the chambers thereof, afterwards, and before the commencement of this suit, and after the pleading of the said plea in the said former action, and at the said times, when, &c., in the second count in that behalf mentioned, to wit, on the day and year last aforesaid, were inundated and filled by the said water which by means *539] of the *premises so flowed through the said holes, and penetrated and permeated through the said vein or seam of coal so forming the eastern extremity of the said colliery called Plas Bennion, in the second count mentioned, and into the said chambers thereof: That, by reason of the premises, the said company afterwards, and before the commencement of this suit, and after the pleading of the said plea in the said former action, and at the said times when, &c., in the second count mentioned, to wit, on the several days and times last aforesaid, and thence always up to the time of the commencement of this suit, were hindered and prevented from digging and obtaining coal from the mines of coal then being in and parcel of the said colliery called Plas Bennion in the second count mentioned, and from enjoying and working the said colliery called Plas Bennion in the second count mentioned, in so extensive, complete, beneficial, and convenient a manner as they otherwise might and would have done; and that, by reason of the premises, afterwards, and before the commencement of this suit, and after the pleading of the said plea "in the second count mentioned," (a) and at the said times when, &c., in the second count in that behalf mentioned, to wit, on the 1st of January, 1846, and on divers and very many other days and times after the said colliery called Plas Bennion, in the second count mentioned, and the chambers thereof, had been so inundated, and before the commencement of this suit, the said company were forced and obliged to, and at those times did, pump from the said colliery called Plas Ben-

(a) Q. d. "in the said former action."

nion, in the second count mentioned, and the said chambers thereof, the said water wherewith the same had been so inundated and filled, and in so doing were put to great expense, to wit, to the amount of 1000*l.*; and which said grievances above newly-assigned in respect of the grievances in the *second count mentioned, were other and different grievances from the grievances in the last plea mentioned, for the [*540 committing of which the said company, in the name of the plaintiff, as such secretary as aforesaid, and on behalf of the said company, declared against the defendant in the said former action, and in satisfaction and discharge of the damage sustained by the said company in respect of which last-mentioned grievances up to the time when the said plea in the said former action was pleaded, he the plaintiff so accepted and took out of court the said sum of 70*l.*: And this the plaintiff was ready to verify; wherefore, inasmuch as the defendant had not answered the grievances above newly-assigned in respect of the grievances in the second count mentioned, the plaintiff, as such secretary as aforesaid, for and on behalf of the said company, prayed judgment, and the damages by the said company sustained on occasion thereof, to be adjudged to him for and on behalf of the said company.

The defendant pleaded not guilty to the new assignment.

The cause came on for trial at the Chester summer assizes in the year 1846, when, by order of nisi prius, a verdict was found for the plaintiff, "subject to the award and determination of a special case, to be stated for the opinion of this court by a barrister to whom, after the court should have given judgment on the special case, all matters in difference between the said parties were by the said order referred."

The pleadings in this action, and the order of nisi prius, were to form part of the special case. The plaintiffs had abandoned the first count of their declaration.

In obedience to the said order of nisi prius, the following case was submitted to the judgment of the court:—

The plaintiffs, for many years then last past, and up to *the [*541 time of the commencing of this action, were in possession of a colliery called Plas Bennion, in the parish of Ruabon, in the county of Denbigh.

In the year 1846, and while the plaintiffs were in the possession of Plas Bennion, as aforesaid, one Evan Jones, and others, his partners, became possessed of an adjoining colliery called the Avon Eitha colliery, in the same parish.

Evan Jones and his partners continued to be possessed of the last-mentioned colliery until the month of December, 1844. At this time they quitted possession, and were succeeded by the defendant, who has remained in possession ever since.

The Avon Eitha Colliery is on a higher level than the Plas Bennion Colliery.

At the time when Evan Jones and his partners commenced their occupation of the Avon Eitha Colliery, both that colliery and the Plas Bennion Colliery had been worked to a great extent; and they each contained several chambers, made by the removal of large quantities of coal.

At the time last mentioned, the colliery of Plas Bennion was bounded on the east by a vertical seam or vein of coal, the property of the plaintiffs, and part of their colliery; and this seam or vein of coal formed a barrier between the chambers in Plas Bennion and the chambers in Avon Eitha.

In the beginning of the year 1844, Evan Jones and partners made three large holes, called "thyrings," in and through the barrier above mentioned, for the purpose of giving air to the Avon Eitha Colliery.

The defendant became the occupier of Avon Eitha, without any privity, either of contract or of estate, between him and his predecessors, Evan Jones and partners.

*542] At the time when the defendant became such *occupier, there was a large subterranean body of water in Avon Eitha, which communicated with, and was fed by, springs in the neighbourhood. This body of water was on a higher level than the chambers of Avon Eitha, and separated from them by a thick horizontal bar of coal, which was part of Avon Eitha Colliery.

The chambers of Avon Eitha were on a higher level than the thyrings above mentioned; and the thyrings were on a higher level than the chambers of Plas Bennion.

The effect of removing the horizontal bar of coal in Avon Eitha, would be, that the water above mentioned would of itself flow into the chambers of Avon Eitha; and that a large portion of such water would also flow on, of itself, from the chambers of Avon Eitha, through the thyrings, into the chambers of Plas Bennion.

The defendant, during his occupation, and before the month of June, 1845, knowing that these thyrings were then open into Plas Bennion, and that the effect of removing the horizontal bar of coal in Avon Eitha would be as above stated, nevertheless did remove the said bar of coal, for the purpose of obtaining the said coal, and so working his mine in the manner most advantageous to himself.

In consequence of the removal of this horizontal bar of coal in Avon Eitha, the water of itself flowed from the said subterranean body of water into the chambers of Avon Eitha. One portion of the water which had so flowed into the chambers of Avon Eitha, flowed on of itself through the thyrings into the chambers of Plas Bennion. Another portion of the water which had so flowed into the chambers of Avon Eitha, and which, if not obstructed in its natural course, would have flowed down to the bottom of Avon Eitha, and below the thyrings, was obstructed in its natural course by a dam which the defendant had placed in Avon Eitha,

*and near to the thyrlings, and was thereby thrown through the thyrlings into the chambers of Plas Bennion. This dam was removed, before the commencement of the action *next mentioned*, by some of the workmen of the Plas Bennion Colliery. [*543]

The vertical seam of coal above mentioned as forming the eastern boundary of Plas Bennion, would have been sufficient to prevent the said flow of water in Plas Bennion, if the thyrlings had not been made as aforesaid in the said seam of coal, by Evan Jones and his partners.

On the 4th of June, 1845, the plaintiff brought an action on the case against the defendant, for the injury caused to Plas Bennion by the flow of water as aforesaid.

On the 30th of January, 1846, the defendant paid 70*l.* into court, and pleaded the payment in the usual form: and, on the 28th of March, in the same year, the plaintiffs replied, accepting the said payment in satisfaction. The record in that action was to form part of the present case.

The present action was brought on the 30th of April, 1846.

Since the commencement of the first action, and up to the time of the commencement of the present action, water has, in consequence of the removal of the said horizontal bar of coal in Avon Eitha as aforesaid, occasionally flowed of itself, in the manner already stated, from the said subterranean body of water in Avon Eitha into the chambers of Avon Eitha, and so also flowed on of itself, through the thyrlings, into the chambers of Plas Bennion, in the same manner as has been before stated; and the colliery of Plas Bennion has been thereby injured.

With respect to the sufficiency of the said vertical seam of coal, forming the eastern boundary of Plas Bennion, as a subsisting barrier to prevent the last-mentioned flow of water, if the thyrlings had not been made in the said barrier, and with respect to the defendant's knowledge that the thyrlings continued open, the facts were the same as before stated, with reference to the former action. [*544]

The defendant contends,—first, that this action is not maintainable, as the defendant, in getting the coal from his own mine, in the manner stated, has not done any act which it was his duty to refrain from,—secondly, that, at all events, as he has done no fresh act whatever since the commencement of the first action, to cause a continuance of the flow of water into Plas Bennion, the damage now complained of might have been compensated for in that action, and therefore that the former recovery is a bar to this action.

The plaintiff contends, first,—that it was the duty of the defendant to refrain from cutting through the bar of coal in his own mine, under all the circumstances of the case,—secondly, that, at all events, by paying money into court in the former action, the defendant has estopped himself from disputing the alleged duty,—thirdly, that the recovery in the former action is no bar.

The question for the opinion of the court is, whether the present action is maintainable.

Townsend (with whom were *Egerton* and *T. Jones*), for the plaintiff. It is submitted, that, under the circumstances stated in this special case, this action is maintainable. The maxims "*Prohibetur ne quis faciat in suo quod nocere possit alieno*," and "*Sic utere suo ut alienum non lædas*," are distinctly applicable. It was the duty of the defendant to prevent the damage which has accrued to the plaintiff from the flowing of the *545] water through the thyrllings into his mine, in *consequence of the removal by the defendant of the horizontal bar of coal in Avon Eitha. "*Qui non prohibet quod prohibere potest, assentire videtur*," 2 Inst. 305. The true test is given in *Mr. Smith's note to Ashby v. White*, 2 Lord Raym. 938, 1 Smith's Leading Cases, 131, *d*:—"The mode of determining whether damage have or have not been occasioned by what the law esteems an *injury*, is, to consider *whether any right* existing in the party damnified, have been infringed upon; for, if so, the infringement thereof is an injury: and, if an injury be shown, the law will presume that some damage resulted from it." The law does not permit a man to transmit fire, or water, or impure air, or to allow his cattle to stray, beyond his own boundaries, so as to injure or annoy his neighbours. In *Lambert v. Bessey*, Sir T. Raym. 421, it is said, that "In all civil acts, the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering; and, therefore (M. 6 E. 4, fo. 7 a, pl. 18), in trespass *quare vi et armis clausum fregit, et herbam suam, pedibus conculcando, consumpsit*, in six acres, the defendant pleads that he hath an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and they, *ipso invito*, fell upon the plaintiff's land, which is the same trespass: and the plaintiff demurred; and adjudged for the plaintiff; for, though a man doth a lawful thing, yet, if any damage do thereby befall another, he shall answer it, if he could have avoided it. As, if a man lop a tree, and the boughs fall upon another, *ipso invito*, yet an action lies. If a man shoot at butts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the willows growing upon the river side, which accidentally stop the water, so as your mill is hindered, an action lies. If I *546] am *building my own house, and a piece of timber falls on my neighbour's house and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and in lifting it up hit another, an action lies by that person; and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed." The case in the Year-Book presents an illustration which is not noticed in *Lambert v. Bessey*: *PIGOT, J.*, says: "So, if a man hath a pond in his manor, and lets off the water, in order to catch the fish therein, and the water inundates my land, I shall have an action, though the doing so by him was lawful." [*CRESSWELL, J.* If

the barrier had still existed, the defendant would have done no wrong: the injury of which the plaintiff complains, is the result of the act of the defendant's predecessor, with whom he is in no privity, and for whose acts he is not responsible. MAULE, J. The law upon the subject of subterranean rights was very much discussed in the recent case of *Acton v. Blundell*, 12 M. & W. 324. The distinction between subterranean and surface rights seems to be this:—As to surface flows, parties acquire rights to them because there is the acquiescence of everybody who has any interest in the matter. But, as to under-ground percolations, no rights are gained, because nobody knows anything about them.] In *Haward v. Bankes*, 2 Burr. 1113,—where the circumstances were precisely like those of the present case,—it was assumed that the action would lie; the only question raised, being one of misjoinder. In *Aldred's case*, 9 Co. Rep. 57 a, it was held that an action on the case lies for erecting a hog-stye so near the house of the plaintiff that the air thereof was corrupted: so of a lime-kiln, if the smoke enters the plaintiff's house so that he cannot dwell there: so *of a dye-house, &c., if the filth runs into his fish-pond, &c. In [**547* *Tenant v. Goldwin*, 1 Salk. 360, in an action on the case, the plaintiff declared that he was possessed of a messuage, and in a cellar, part thereof, was wont to lay coals, beer, &c., that the cellar joined to the defendant's messuage, and by a wall, which the defendant *debuit reparare*, was separated and defended from the defendant's privy, and that, for want of repairing this wall, *fæditates et sordida suricæ prædic. in cellarium ipsius quer. fluebant*, &c. Upon a motion in arrest of judgment, HOLT, C. J., gave judgment for the plaintiff,—“because it was the defendant's wall and the defendant's filth, and he was bound, of common right, to keep his wall so as his filth might not damnify his neighbour; and that it was a trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's.” In *Tubervil v. Stamp*, 1 Salk. 13, 1 Ld. Raym. 264, 1 Comyn's Rep. 32,—which was an action on the case upon the custom of the realm, “*quare negligenter custodivit ignem suum in clauso suo, ita quod per flammæ blada quer. in quodam clauso ipsius quer. combusta fuerunt*,”—after verdict *pro quer.*, it was objected that the custom extended only to fire in his house or curtilage (like goods of guests), which were in his power. *Non alloc*, for the fire in his field was his fire (1 Man. Gr. & S. 586), (a), as well as that in his house; he made it, and must see that it does no harm, and answer the damage, if it does. Every man must use his own so as not to hurt another: but, if a sudden storm had risen, which he could not stop, it was matter of evidence, and he should have showed it. And HOLT, ROKEBY, and EYRE, against the opinion of TURTON, who went upon the difference between fire in *an house, which is in a man's custody [**548* and power, and fire in a field, which is not properly so; and it

would discourage husbandry, it being usual for farmers to burn stubble, &c. But the plaintiff had judgment according to the opinion of the other three." In *Vaughan v. Menlove*, 3 N. C. 468, 4 Scott, 244, it was held that an action lies against a party for so negligently constructing a hayrick on the extremity of his land, that, in consequence of its spontaneous ignition, his neighbour's house is burned down. Although that case has been somewhat questioned, it has received the sanction and support of the court of Queen's Bench in the recent case of *Filliter v. Phippard*, 11 Q. B. 347. In that case, it was held, that the 86th section of the building act, 14 G. 3, c. 78, which enacts that no action shall be maintained against any person in whose house or on whose estate any fire shall "*accidentally* begin," does not apply where a fire is produced by *negligence*,—in which case, by the common law, an action lies against the party by whose negligence, or by that of whose servants, a fire arises on his premises, and damages the property of another: nor does it apply where the fire is lighted *intentionally*, and mischief happens to result. In *Sutton v. Clarke*, 6 Taunt. 29, it was held that one who, in the exercise of a public function, without emolument, which he is compellable to execute, acting without malice, and according to his best skill and diligence, and obtaining the best information he can, does an act which occasions consequential damage to a subject, is not liable to an action for such damage. The facts of that case were these:—The trustees of a turnpike-road, empowered to make watercourses to prevent the road from being overflowed, directed their surveyor to present a plan for carrying off the water of an

*549] adjacent brook: he recommended, and on that recommendation they adopted, and caused him to make, a wide channel from the road, gradually narrowing, and conducting the water into the ordinary fence-ditches of the plaintiff's land, which were insufficient to discharge it, and his land was consequently overflowed. In giving the judgment of the court, GIBBS, C. J., said: "This case is perfectly unlike that of an individual, who, for his own benefit, makes an improvement on his own land, according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbour: if he thereby unwittingly injure his neighbour, he is answerable. The resemblance fails in the most important point of comparison, that his act is not done for a public purpose, but for private emolument. Here, the defendant is not a volunteer: he executes a duty imposed on him by the legislature, which he is bound to execute. He exercises his best skill, diligence, and caution in the execution of it; and we are of opinion that he is not liable for an injury which he not only did not foresee, but could not foresee. He has done all that was incumbent on him, having used his best skill and diligence."

[MAULE, J. Suppose a man so improves his own land by thorough drainage, that it no longer forms, as it did before, a sort of natural reservoir for the supply of his neighbour's mill, will an action lie?] That must depend upon the precise circumstances and position of the land, and the

nature of the supposed right. In *Gale on Easements*, the author, after adverting to the cases already mentioned, says: (a) "The further question now remains to be considered, whether a man acting in the exercise of his undoubted rights of property, and doing damage to his neighbour, which, under some circumstances, might be justifiable, *is liable to an action if the damage might have been prevented by the use of reasonable care and precaution on his part. This question also turns upon the application of the maxim '*sic utere tuo ut alienum non lædas*;' and, as it is not contested, that, in the interpretation of this maxim, '*alienum*,' must be taken to mean 'the rights of the neighbouring owner,' and that therefore no action can be maintained unless both injury and damage are sustained; (b) the real point to be decided, is—whether, in the absence of any easement restricting the neighbouring owner, a party has a right to impose upon such owner a limitation as to the mode of doing a thing which is one of the undoubted rights of property, and the performance of which he clearly has no right to prevent. 'If a man sustains damage,' says BAYLEY, J., 'by the wrongful act of another, he is entitled to a remedy; but, to give him that title, these two things must concur—damage to himself, and a wrong committed by the other. That he has sustained damage, is not of itself sufficient:' *The King v. The Commissioners of Pagham Level*, 8 B. & C. 355, 2 M. & R. 468." [MAULE, J. Suppose there had been no subterranean body of water in Avon Eitha, but that, the thyrlings being open, heavy rain flooded that colliery, and flowed thence into Plas Bennion, would the owner of the former be responsible?] There, the proximate cause of the injury would be the act of God. Although a man may not be under any legal obligation to repair the fences between his own and his neighbour's closes, he is nevertheless bound to take care that his cattle do not wander from his own land and trespass upon the lands of others: per BAYLEY, J., in *Boyle v. Tamlyn*, 6 B. & C. 320, 9 D. & R. 430. [CRESSWELL, J. You put it as if the defendant *himself had made the thyrlings?] Yes. In *Firmstone v. Wheeley*, 2 D. [*551 & L. 203, the declaration stated that the plaintiffs and defendants were owners of adjacent mines; that the defendants had trespassed on the plaintiffs' mine, and had carried away a quantity of coal; that water had arisen in the defendants' mine, against which, but for the trespass of the defendants, the coal would have been a sufficient barrier; that thereupon it became and was the duty of the defendants to prevent the water in their mine from flowing into the plaintiffs' mine; yet that the defendants neglected their said duty, whereby the water flowed into the plaintiffs' mine, and prevented them from working the same: and it was held, on general demurrer, that this was a good count in case. POLLOCK, C. B., said: "The substance of the complaint

(a) 2d edit., p. 248.

(b) i. e. "unless both wrong is done and damage sustained."

is, that the defendants have removed the only barrier between the mines; and that, therefore, it became their duty so to deal with the water accumulating in their mine, as to prevent it flowing into the mine of the plaintiffs. There may, perhaps, be a difference, as regards the law, between the barrier of a mine and a fence above ground. If a wall is knocked down, the owner may maintain an action for the trespass; but he cannot, by omitting to rebuild it, hold the defendant always responsible for any consequential damage. But here the plaintiffs say, that the removal of the barrier is irreparable, and therefore the duty alleged in this declaration may well arise." In *Acton v. Blundell*, 12 M. & W. 324, it was held that the owner of land through which water flows in a subterraneous course, has no right or interest in it which will enable him to maintain an action against a landowner who, in carrying on mining operations in his own land, in the usual manner, drains away the water from the land of *552] the first-mentioned owner, and lays his well dry. In *Arkwright v. Gell*, 5 M. & W. 203, 225, where a question arose as to the right to a stream of water flowing from a mine, Lord ABINGER, C. B., in answer to a observation of the defendant's counsel, that "their act was a perfectly lawful act of ownership," observed—"If the plaintiffs have established that they have a right as against you to keep the water, it is no answer that you are doing an act in your own land. All water was at first subterraneous." [MAULE, J. The Taff, in Glamorganshire, is not so.] It is a clear and universal intendment of law, that every man contemplates the necessary consequences of his own acts. This case finds that the chambers of Avon Eitha were on a higher level than the thyrings, and that the thyrings were on a higher level than the chambers of Plas Bennion; and that the necessary consequence of the removal of the horizontal bar of coal in Avon Eitha, would be, that the water in Avon Eitha would of itself flow into the chambers of Avon Eitha, and that a large portion of it would flow on of itself through the thyrings into the chambers of Plas Bennion. [MAULE, J. The court, in *Acton v. Blundell*, seem to have adopted the doctrine there cited from *Marcellus*, Dig. lib. 39, tit. iii. § 12,—"*Cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi, nec de dolo actionem: et sanè non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi, id fecit.*"] That cannot be held to be the principle of the English law, without overruling the doctrine of GIBBS, C. J., in *Sutton v. Clarke*. The owner of a mine is bound to work it in a reasonable manner, and so as not to injure property adjoining: *Harris v. Ryding*, 5 M. & W. 60. The fair result of the cases seems to be, that a man is responsible for an injury to the owner of an adjoining mine or land, which necessarily results from acts *553] done by him, though upon his own land: *Wilde v. Minsterley*, 2 Roll. Abr. 564, tit. *Trespass, Justification* (J.), pl. 1; *Brown v. Windsor*, 1 C. & J. 20; *Jones v. Bird*, 5 B. & Ald. 837, 1 D. & R. 497; *Walters v. Pfeil*, M. & M. 362; *Wyatt v. Harrison*, 3 B. & Ad.

871; *Dodd v. Holme*, 1 Ad. & E. 493, 3 N. & M. 739; *Trower v. Chadwick*, 6 N. C. 1, 8 Scott, 1; *Davis v. The London and Blackwall Railway Company*, 1 M. & G. 799, 2 Scott, N. R. 74.

The recovery in the former action is no bar to the present action, which is brought to recover damages for the continued omission, on the part of the defendant, to prevent water from flowing into the plaintiff's mine. The plaintiff could not for this have recovered prospective damages in the former action: *Sutton v. Clarke*; *Roberts v. Read*, 16 East, 215; *Howell v. Young*, 5 B. & C. 259, 8 D. & R. 14. Every new flow of water is a new nuisance, according to the doctrine of Lord HOLT, in *Fetter v. Beale*, 1 Salk. 11. In *Thompson v. Gibson*, 7 M. & W. 456, which was an action on the case for continuing a nuisance to the plaintiff's market, by a building which excluded the public from a part of the space on which the market was lawfully held, it appeared that the building was erected in October, 1838, under the superintendence and direction of the defendants, not on their own land, but on that of the corporation of K. (of which corporation they were members). The Earl of L. was the owner of the market in October, 1838; and, in February, 1839, he demised it to the plaintiff; and, the market being afterwards obstructed by the building, this action was brought: and it was held that the defendants were liable for continuing the nuisance, although they had no right to enter upon the land to remove it, and that the action was therefore maintainable. PARKE, B., in delivering the judgment of the *court, [*554 says: "That the defendants were responsible for some consequences of the original erection of the building, to the then owner of the market, though the defendants were not acting for their own benefit, but for that of the corporation, is not disputed; nor could it be. If they are considered merely as servants of the corporation, they would be liable, just as the servant of an individual is, if he is actually concerned in erecting a nuisance,—*Wilson v. Peto*, 6 J. B. Moore, 47; and, as they would clearly have been responsible to the then owner of the market for the immediate consequences of their wrongful act, how can their liability be confined to the injury by the interruption of the first market? or, what other limit can be assigned to their responsibility, otherwise than the continuance of the injury itself? Is he who originally erects a wall by which ancient lights are obstructed, to pay damage for the loss of the light for the first day only? or, does he not continue liable so long as the consequences of his own wrongful act continue, and bound to pay damages for the whole time? And, if the then owner of the market might have maintained an action against the defendants for the injury to his franchise, for the whole period during which the defendants' act continued to be injurious to him, his lessee must be in the same condition as to subsequent injuries; for, it is clearly established that he has a right of action for every continuing nuisance: and to that effect is the authority of 2 Roll. Abr. *Nuisance*, K. 2,(a)—If one is seised of land near

a river, and another stops it with loads of earth, and the tenant of the land adjoining leases to another for years, and then the stoppage continues, by which the land of the lessee is overflowed (*surround*), the lessee shall have an action on the case against him; for, though the *stoppage was in the time of his lessor, the continuance was a *555] wrongful damage to the lessee, for, his land was overflowed.' That is the case of *Westburne v. Mordant*." (b) In *Holmes v. Wilson*, 10 Ad. & E. 503, where the trustees of a turnpike-road built buttresses to support it, on the land of the plaintiff, and the plaintiff thereupon sued them and their workmen, in trespass, for such erection, and accepted money paid into court in full satisfaction of the trespass,—it was held, that, after notice to the defendants to remove the buttresses, and a refusal to do so, the plaintiff might bring another action of trespass against them for keeping and continuing the buttresses on the land; to which the former recovery was no bar.—In *Hodsoll v. Stallebrass*, 11 Ad. & E. 301, 3 P. & D. 200, the entire damage to the master arose from the injury,—found by the jury to be permanent,—done at the time specified in the declaration: and LITLEDALE, J., said that no fresh action could be brought from time to time—"the action being founded, not upon the damage only, but upon the unlawful act and the damage." The authorities are collected in the notes to *Hambleton v. Veere*, 2 Wms. Saund. 169 c.(1), and n. (f).

Welsby (with whom were *J. Evans* and *J. Brown*), contra. Under the circumstances stated in this case, the law imposed no duty upon the defendant to prevent the water in his mine from flowing into that of the plaintiff. No act of commission is charged against the defendant: and the case does not even state that the making the thyrlings or holes in the seam of coal in *Plas Bennion*, was done by *Evan Jones* without license; and the court will not assume that it was an act of trespass. At all events, the defendant is not responsible for the act of *Jones*, between *556] whom and himself it is expressly stated that there was no privity either of contract or of estate. This being the state of facts, what duty was there in the defendant to abstain from working his mine in the manner most beneficial to himself, or to take precautions to prevent the water from his mine passing into the plaintiff's mine? No servitude, no right of easement is alleged; the plaintiff's claim rests upon the mere fact of the contiguity of the two mines. In truth, this is *damnum absque injuria*. The defendant's knowledge that the result of his working his mine in the way he did would cause inconvenience to the plaintiff, is no legitimate part of the case. All the authorities cited on the other side are distinguishable, on the ground, that, in each of them, there has either been a trespass committed by the defendant, or he has been guilty of some act of negligence in dealing with his own pro-

(a) Translated, 16 Vin. Abr. p. 32.

(b) Which is also reported, Cro. Eliz. 181.

perty. Thus, in *Lambert v. Bessey*, Sir T. Raym. 421 (see 3 M. & G 519), the plaintiffs in error had been guilty of a wrongful act. So, in the case there cited from the Year Book of 6 E. 4, fo. 7, pl. 18,—the instance put by PIGOT, J., of a man letting off the water from a fish-pond,—it was unnecessary to adopt that course for the purpose of taking the fish. In *Haward v. Bankes*,—which seems most of any to resemble this case,—it is consistent with what appears in the case that the injury complained of was the result of a direct act of commission by the defendant; as in the former action here. *Firmstone v. Wheeley* was also the case of an act of commission. Aldred's case, 9 Co. Rep. 57 a, is also distinguishable on the same ground. *Tenant v. Goldwin* was a case of trespass. *Tubervil v. Stamp* and *Vaughan v. Menlove* were cases of negligence. So also was *Filliter v. Phippard*. The *dictum* of GIBBS, C. J., in *Sutton v. Clarke*, is to be taken with reference to the facts of that case. The *present case is more analogous to those where it has been held [*557 that a man who builds upon the extremity of his land, thereby gains no right to support from the adjoining land for such additional weight. The authorities upon that point are collected in Gale on Easements, 218 *et seq.* In *Partridge v. Scott*, 3 M. & W. 220, the doctrine was applied to the working of mines. The maxim "*Sic utere tuo ut alienum non lædas*," does not go to forbid *damna* generally, but *damna injuriosa*. To constitute a violation of that maxim, there must be *injuria* as well as *damnum*. There are many cases in which a man may lawfully use his own property so as to cause damage to his neighbour, provided the *damnum* be not *injuriousum*. He may build a wall on his own ground, so as to obstruct the lights of his neighbour, where no right to them has been acquired by grant or adverse user. He may build a mill near the mill of his neighbour, to the grievous damage of the latter, by loss of custom; and so in other cases. In Bracton, lib. 4, fo. 221, there is the following passage:—"Nocumentum enim poterit esse justum, et poterit esse injuriousum. Injuriousum, ubi quis fecerit aliquid in suo injustè contra legem vel contra constitutionem, prohibitus a jure. Si autem prohiberi a jure non possit ne faciat, licet nocumentum faciat et damnosum, tamen non erit injuriousum; licitum est enim unicuique facere in suo quod damnum injuriousum non eveniet vicino; ut si quis in fundo proprio construat aliquod molendinum, et sectam suam et aliorum vicinorum, subtrahat vicino, facit vicino damnum et non injuriam: cum a lege vel a constitutione prohibitus non sit, ne molendinum habeat vel construat." To derive, therefore any aid from the maxim *sic utere tuo ut alienum non lædas*, the plaintiff must show that he has sustained *injuriam*; which is the whole question. Suppose a man, by an improved system of drainage, causes an *excess of water to flow upon the lands of his neighbour upon a lower level; would he be liable to [*558 an action? Clearly not. Even that is supposing a case much less favourable to the defendant than the facts of this case warrant; for it

supposes all things to be in their natural state. Take the case of a belt of trees near the sea-shore, the removal of which might be injurious to the adjacent land, by admitting thereon a saline deposit. Would an action lie for that? [MAULE, J. If, for a belt of trees, you substituted an ancient wall, there might be a difficulty in the case you put.] In the *King v. The Commissioners of Sewers of Pagham Level*, 8 B. & C. 355, 2 M. & R. 468, Lord TENTERDEN says (8 B. & C. 359):—"I am of opinion that the only safe rule to lay down is this, that each land-owner for himself, or the commissioners acting for several land-owners, may erect such defences for the land under their care as the necessity of the case requires; leaving it to others, in like manner, to protect themselves against the common enemy." The rights and liabilities of parties to erect defences on the sea-shore, are considered in *Keighley's case*, 10 Co. Rep. 139 a, and in the *Mayor, &c., of Lyme Regis v. Henley*, 3 B. & Ad. 77, and *Callis on Sewers*, pp. 74 *et seq.*

Townsend, in reply. The plaintiff had an undoubted right to the enjoyment of his mine without having water intruded into it from the defendant's mine. The charge against the defendant is, that he wrongfully abstained from doing what he knew to be necessary to prevent the water in his mine from flowing down to, and injuring, the plaintiff's mine. There is a right of the plaintiff's infringed upon, and a breach of duty *559] committed by the defendant. *Haward v. Bankes* is *precisely this case. [MAULE, J. Nobody suggests that an action will not lie for *wrongfully* turning water into another man's mine.] In *Kent's Commentaries*, vol. III. p. 436, note (b), it is said:—"The law of vicinage rests on just foundations. Any act or default of the possessor of a tenement, to the injury of a party interested in the neighbouring tenement, becomes a nuisance." And, after referring to *Vaughan v. Menlove*, *Tubervil v. Stamp*, and *Barnard v. Poor*, 21 Pick. Rep. 378, the learned commentator adds:—"The principle is, that every man is bound so to deal with his property as not to injure the property of others." [MAULE, J. A man may very well justify the consequences resulting from the legitimate use of his own land. But, if he acts negligently, or capriciously, and injury results, no doubt he is liable.] Many instances of nuisances that are actionable, though resulting from acts in themselves lawful, are given in *Fitzherbert's Natura Brevium*, page 184, and in *Blackstone's Commentaries*, vol. III. p. 217, *et seq.*(a) The cases as to easements are not applicable: nor is there any distinction between surface rights and rights under ground, except that suggested in *Acton v. Blundell*. The defendant was clearly bound to prevent the water in his mine from escaping into the plaintiff's mine, in the same manner that a man is bound to keep his cattle from straying into his neighbour's field. [MAULE, J. The owner of cattle is in possession of a thing that is beneficial to him. The case of water in a mine is very different: it is

(a) And see *Fay v. Prentice*, 1 Man. Gr. & S. 828.

the man's misfortune to have it there.] That does not justify him in making his neighbour share the misfortune with him.

Cur. adv. vult.

*CRESSWELL, J., now delivered the judgment of the court.

After stating the pleadings and the principal facts, *ut antè*, the [*560 learned judge proceeded as follow. —

The claim of the plaintiff to compensation in this case is advanced on two grounds :—first, on a supposed duty in the defendant, arising out of the act of Evan Jones in removing the plaintiff's barrier of coal, when he occupied Avon Eitha, and the subsequent occupation of the same colliery by the defendant;—secondly, on a general liability said to be imposed by law upon the defendant, to be responsible for the injury done to an adjoining colliery by water casually introduced into his own, in the course of working it.

As to the first point, it is to be observed that there was no privity of any kind between Evan Jones and the defendant. The act done by Jones, of which complaint is made, was done, *not upon the premises now occupied by the defendant, but upon those of the plaintiff*. Nor does the defendant derive his title to the premises which he occupies, in any way from Jones. Indeed, in the special case, it is expressly stated that there was no privity, either of estate or contract, between Jones and the defendant. In *Rosewell v. Prior*, 2 Salk. 460, the defendant, tenant for years, erected, on his own premises, that which was a nuisance to the plaintiff's house, and then made an underlease: and it was held that the plaintiff might sue either the defendant or his sub-lessee. Upon the same principle, if Jones had done anything in Avon Eitha colliery which made his premises, in their then state, a nuisance to the plaintiff's colliery, the defendant, as occupier, might have been made responsible for continuing them in that state, as for upholding the nuisance.(a) But this is a very different *case. The premises occupied by the defendant are not a nuisance. The act done by Jones, to the injury of [*561 the plaintiff's mine, was *on the plaintiff's soil*, where the defendant would have no right to go, even if he wished it, for the purpose of remedying the evil that Jones had previously done. We think, therefore, that no special duty to protect the plaintiff's mine against water in the defendant's mine attached to the latter, in consequence of Jones having removed the plaintiff's barrier of coal when he occupied Avon Eitha, and of his, the defendant's, having succeeded him in such occupation.

The next ground upon which it was contended that the defendant was liable in this action, is much broader, *viz.* that he was, of common right, bound to prevent the water coming into his own mine, from flowing into his neighbour's. In considering this question, it is material to remember, that, in the special case, it is stated that the defendant worked out the coal which protected his own mine from the subterranean body of

(a) *Vide* 1 Man. Gr. & S. 586 (a).

water, for the purpose of obtaining the coal, and so working his mine in the manner most beneficial to himself. There is nothing from which we can infer that it was an unusual or a negligent mode of proceeding, or that it was done with any design to injure his neighbour's mine. In order to establish the proposition, that the defendant was bound to prevent the flow of water from his own mine into the plaintiff's, the case of *Tenant v. Goldwin*, 1 Salk. 360, was relied on. That was an action on the case, in which the plaintiff declared, that he was possessed of a messuage, and in a cellar, part thereof, was wont to lay coals, &c.; that the cellar joined the defendant's messuage, and by a wall which the defendant *debuit reparare*, was separated and *defended from the *562] defendant's privy, and that, for want of repairing the wall, the filth flowed through into the plaintiff's cellar. There was judgment by default, and damages were assessed upon a writ of inquiry; and then there was a motion in arrest of judgment. The declaration was held sufficient; and Lord Holt said that "it was the defendant's wall, and the defendant's filth; and he was bound of common right to keep his wall so as his filth might not damnify his neighbour, and that it was trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's." It was, therefore, a very different case from the present. There, there was no barrier between the plaintiff's mine and the defendant's which the latter could repair; and the flow of water into the plaintiff's mine cannot be considered as a trespass. Again, the declaration in that case was held good on account of the words *debuit reparare*, which are inapplicable to the present case. But for the removal of part of the barrier of coal at the eastern side of the plaintiff's mine, the water in the defendant's mine would have done no harm; and for that removal the defendant is not responsible.

But a great many cases were referred to in the argument, to show, that, independently of all questions about the removal of the barrier in the plaintiff's mine, the defendant was bound, at all events, to take care that the water which flowed into his own mine should not pass into the plaintiff's. *Tuberville v. Stamp*, *Vaughan v. Menlove*, *Sutton v. Clarke*, *Boyle v. Hamlyn*, *Brown v. Windsor*, *Dodd v. Holmes*, and others of that class, were referred to; but, in each of those, negligence was imputed to the defendant in doing the act *upon his own premises*, which proved injurious to his neighbour: whereas here, there is nothing to show that *563] there was *any negligence on the part of the defendant in working his colliery.

A case quoted from the Year Book, M. 6 E. 4, fo. 7, pl. 18, in *Lambert v. Bessey*, was relied on as an authority for the plaintiff, where negligence was not imputed to the defendant: but, upon an examination of the original report, it hardly supports that statement. It was an action for trespass to the plaintiff's close, and damaging the grass

by walking, &c. The defendant justified, for that he had a close separated from it by a thorn hedge, and, when he was cutting the thorns, they fell, *ipso invito*, into the plaintiff's close; wherefore, he entered to take them away. After much discussion, it was held, (a) that, to make the plea good, the defendant should have said, not only that the thorns fell *ipso invito*, but that he could not have cut them in any other way, and that he did all in his power to prevent them from falling upon the plaintiff's land.

Then, the case of *Haward v. Bankes* was said to be a direct authority for the plaintiff: but it is not so. The decision of the court was simply, that a count charging the defendant with *having caused* water to flow through divers other collieries into the plaintiff's, was a count in case. It is true, that the plaintiff recovered in that action; but there can be doubt that a man may cause water to flow from his own premises into his neighbour's, so as to make himself liable to an action,—for instance, by erecting a mound, or other work, to give it that direction; as appears to have been done by the present defendant before a former action was commenced, and in which he paid money into court as a compensation. In this case, it ought not to be said that he *caused*, but that he *permitted*, the water to flow into the plaintiff's mine.

*Another case relied on by the plaintiff, *Firmstone v. Wheeley*, [564] also differs from this case in a very material particular,—viz., that the defendant there had removed from the plaintiff's mine, by a trespass, a barrier of coal, which, had it existed, would have prevented the water from flowing from the defendant's mine into the plaintiff's: and, although it is hardly to be treated as a decision, the court of Exchequer appears to have thought, that, having wrongfully removed that barrier, the defendant was bound to protect the plaintiff's mine against the flow of water: and, if this action had been against Jones when he occupied Avon Eitha, it might have been urged as an authority against him. But, if Jones had been sued in trespass for removing the barrier, a second action could not have been maintained against him for the consequential damage done to the plaintiff's mine, by the water flowing into it from Avon Eitha. (b) If no such action could have been maintained against him, it would be singular if it could be maintained against a party not in any way connected with him, for the consequential damage arising from his act of trespass.

. Treating the question as a new one, not governed by the authority of any decided case,—for, all those referred to are distinguishable,—it would seem to be the natural right of each of the owners of two adjoining coal mines,—neither being subject to any servitude to the other,—to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be, that some prejudice will accrue

(a) By CHOLE, C. J. of C. P.

(b) See *Clegg v. Dearden*, 17 Law Journ., N. S., Q. B. 233.

to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party.

*565] In the present case, it could not be disputed, that, *but for the excavation of the plaintiff's coal, the defendant would have been entitled to work out the whole of his own coal; for, if the space which it had occupied became afterwards filled with water, that would have done no harm to the plaintiff, if his coal also had not been excavated: and, if he afterwards excavated his own, and the water flowed in from the defendant's workings, he would not, on that account, have any right of action for the damage done by it. His position would be very similar to that suggested by Lord HOLT, in *Tenant v. Goldwin*, where he says: "The case might, indeed, possibly be such, that the defendant might not be bound to repair; as, if the plaintiff made a new cellar under the defendant's old privy, or in a vacant piece of ground which lay next to the old privy before; in such case, the plaintiff must defend himself." Here, however, the working of the two mines has been simultaneous: but, the defendant's mine not being subject to any servitude, what authority is there for saying that the plaintiff, by working his coal, could alter or abridge the defendant's right to work his own? Surely, the reasonable thing is, that the plaintiff should leave part of his own coal, to protect his own workings against the influx of water. The plaintiff, it appears, took that view of the matter, and left the barrier, which would have been sufficient for the purpose, but was broken through by a wrongdoer, for whose act the defendant is not responsible.

There are many cases in which the principle has been recognised, that one landowner cannot, by altering the condition of his land, deprive the owner of the adjoining land of the privilege of using his own as he might have done before. Thus, he cannot, by building a house near the margin of his land, prevent his neighbour from excavating his own land, although it may endanger the house; nor from building on his own land, although it may obstruct windows, unless, indeed, by lapse of time, *the
*566] adjoining land has become subject to a right analogous to what in the Roman law was called a servitude. So, also, in *Acton v. Blundell*,—where the subject was very much discussed,—the court held that one landowner, having dug a well on his own land, could not maintain an action against a party who afterwards sunk a coal-pit in the neighbourhood, which had the effect of drawing the water away from his well; the act not being done by the defendant negligently or maliciously, but in a proper manner, for the purpose of winning his own coal.

We think that the same principle is applicable to the present case. The water is a sort of common enemy,—as was said by Lord TENTERDEN, in *Rex v. The Commissioners of Sewers for Pagham Level*,—against which each man must defend himself. And this is in accordance with the civil law, by which it was considered that land on a lower level, owed

a natural servitude to that on a higher, in respect of receiving, without claim to compensation, the water naturally flowing down to it.(a)

There was another point submitted to the court by the special case, but upon which very little was said in argument, *viz.* that the defendant, by paying money into court in the former action, had precluded himself from saying that he was not liable to be sued. But upon looking at the declaration in that case, it appears that he was charged with *erecting* a dam, and thereby turning the water into the plaintiff's mine; for which he was of course responsible; and the admission of that cause of action can have no bearing on this.

Upon the whole, then, we are of opinion, that, upon the facts stated in this special case, the plaintiff is not entitled to recover, and that the *postea* must be delivered to the defendant.

Postea to the defendant.(b)

(a) Dig. Lib. 39, tit. 3.

(b) See *Wood v. Waud*, 3 Exch. 748.

***ROBERT PARGITER HUMFREY**, a Lunatic, by **EDWARD COOPER**, his Committee, and the said **EDWARD COOPER** [*567 as such Committee, *v.* **WILLIAM HUGH WADE GERY**. *Feb.* 14.

The 42d section of the 3 & 4 W. 4, c. 27, is not repealed by the 3 & 4 W. 4, c. 42, s. 3.

A. was, from the 2d of July, 1805, till the 10th of July, 1841 (when he was found a lunatic), and B., his committee, had ever since been, seised as of fee of two-thirds of a fee-farm rent of 20*l.* 5*s.* *per annum*, payable on the 29th of September and 25th of March, created by letters-patent of the 29 H. 8. No payment of this rent, or of any part thereof, had been made since March, 1831, nor had there been any acknowledgment in writing relating thereto:—

It is held, that the case was governed by the 42d section of the 3 & 4 W. 4, c. 27, and, consequently, that neither the lunatic nor his committee was entitled to recover any arrears of the rent after the expiration of six years from the 29th of September, 1831.

THE following case was sent by Vice-Chancellor KNIGHT BRUCE,—pursuant to a decree dated the 1st of March, 1847,—for the opinion of the judges of this court:—

Robert Pargiter Humfrey was, on or before the 2d of July, 1805, and thenceforth to the 10th of July, 1841, continued to be, and he, and Edward Cooper, as committee of his estate, and in his right, or one of them, ever since that time, has or have been, and still are or is, seised, as of fee, of two third parts of a certain rent-charge,(a) or fee-farm rent of 20*l.* 5*s.* yearly issuing, and payable on the 29th of September and 25th of March in each year, out of certain lands called Bushmead Priory; which rent-charge or fee-farm rent was created by letters-patent of King Henry the Eighth, under the great seal of England, bearing date the 26th *of September, in the 29th year of his reign; of which the [*568 following is a copy:—

(a) The letters-patent clearly showing a reservation of that species of rent-service which constitutes a fee-farm, or, as it is, somewhat redundantly, called, a fee-farm rent, it is difficult to see what caused the introduction of the term "rent-charge."

“First Part. }

“29 Hen. 8. }

The King, to all to whom, &c., greeting: Whereas, by a certain indenture made under Our great seal of the court of Augmentations of the revenues of Our crown, bearing date at Westminster, the 2d of May, in the twenty-ninth year of Our reign, We, by the advice and consent of the council of Our court aforesaid, demised, granted, and to farm leased to John St. John, knight, the house and site of the late priory of Buoshemeyd, in our county of Bedford, by the authority of parliament suppressed and dissolved, together with all houses, buildings, barns, orchards, gardens, lands and ground within the pale and circuit of the said late priory, and all the underwritten lands, meadows, and pastures to the same late priory belonging and appertaining, viz. [setting out the parcels]; except, nevertheless, and to Us, Our heirs and successors altogether reserved, all timber-trees and woods growing and being of, in, and upon the premises, and all such buildings of every kind within the site and precinct of the said late priory, which We might order to be there afterwards provided for and set up,—To have and to hold the site aforesaid, and all the aforesaid lands, meadows, pastures, mill, and other the premises, with the appurtenances, except as before excepted, to the before-named John and his assigns, from the feast of the Annunciation of the Blessed Virgin Mary last past, until the end of the term, and for the term of twenty-one years from thence next following, and fully to be completed; yielding therefore annually to Us, Our heirs and successors, 20*l.* and 16*d.* of lawful English money, at the feast of St. Michael the Archangel, and the Annunciation of the Blessed Virgin Mary, or within one month after either of those feasts, to be paid by *equal portions, at the court aforesaid, during the aforesaid

*569] term,—as, in Our court of Augmentations aforesaid, among other things, more fully appeared of record; the reversion of the premises in form aforesaid leased, belonging, after the term aforesaid is fully determined, to Us, Our heirs and successors: Know ye, that We, as well in consideration of the good, true, and faithful service to Us by Our beloved servant William Gascoigne, knight, before this done, as in consideration of the manor of Dame Elynsbury, with the appurtenances, and of other the lands and tenements in Dame Elynsbury and Bedford Haughton, in Our county of Bedford, by the same William to Us, Our heirs and successors, for ever given and granted, have, of Our special grace, and upon Our certain knowledge and mere motion, given and granted, and by these presents do give and grant, to the before-named William Gascoigne, and Elizabeth, his wife, and the heirs and assigns of the same William, the reversion and reversions of the aforesaid site and of all and singular other the premises to the before-named John St. John by Us in form aforesaid leased, with the end of the term aforesaid, or in whatever other manner it shall happen; and all the aforesaid rent of 20*l.* and 16*d.*; also the church, belfry, and cemetery of the said late priory:

and also our messuages, ranges, dove-cotes, houses, and buildings, as well within as without the site and precinct of the said late priory; and also all and every kind of timber trees, woods, and underwoods growing and being in and upon the premises, to the before-named John St. John, as above recited, leased; and also all and singular manors, &c., and hereditaments whatsoever, with the appurtenances, situate, lying, and being in the vills, fields, parishes, places, and hamlets of Bushmede, Eyton, otherwise Eton Staple, otherwise Staplehow, Horneydon, Delhowe, otherwise Denehowe, Wiboston, otherwise Wyboldeston, Little Stokton, *Blassworth, Colnorth, Barford, Charlston, otherwise Chalmerston, Cayshoo, Bedford, Mogerhanger, and Peternall, in Our said county of Bedford, and in Great Stokton and Blasseworth, in Our county of Huntingdon, to the said late priory of Bushmede in any manner belonging or appertaining, and in the hamlets of the said counties, which by reason and pretext of the dissolution and suppression of the same late priory to Our hands have come, or ought to have come, and in Our hands now are, or ought to be, as fully and entirely as Robert Burre, the late prior of the said late priory, or his predecessors, priors of the same late priory, in right of the same, on the 4th day of February, in the 27th year of Our reign, or theretofore, had, held, or enjoyed, or ought to have had, held, or enjoyed all and singular the premises above expressed and specified, or any parcel of the same, with the appurtenances,—except, nevertheless, thereout, and to Us, Our heirs and successors, altogether reserved, the advowsons, donations, and rights of patronage of the churches, vicarages, chantries, chapels, and prebends whatsoever; which same reversion, rent, church, belfry, cemetery, messuages, lands, tenements, manors, and all and singular other the premises above by these presents granted, with the appurtenances, are of the clear value of 60*l.* 14*s.* 10*d.*, and not beyond, by the year,—To have, hold, and enjoy all and singular the premises above expressed and specified, with all and singular their rights, appurtenances, and commodities whatsoever, to the before-named William Gascoigne, and Elizabeth, his wife, and the heirs and assigns of the said William Gascoigne, forever; to be held of Us, Our heirs and successors, in capite, by knights' service, viz. by the tenth part of the service of one knight's fee, and by the yearly rent of 20*l.* 5*s.*, to be paid to Us, Our heirs and successors, at the court of Augmentations of the revenue of Our Crown, at the feast of St. Michael *the Archangel, in full for all other services, exactions, demands, &c.; so that express mention of the true value [*571 by the year, &c. Witness, &c.

“By writ of privy seal.”

On or before the 2d of July, 1805, the said Robert Pargiter Humfrey became of unsound mind; and he has ever since been, and still is, a lunatic, and wholly incapable of managing his affairs.

The Rev. Nathaniel Humfrey, the next eldest brother of the said

lunatic (and his presumptive heir-at-law), in the month of March, 1831, contracted with Hugh Wade Gery, who was then the owner in fee of the said lands out of which the said rent-charge or fee-farm rent was payable, and also owner in fee of the remaining one-third part (if subsisting) of the said rent-charge or fee-farm rent, for the sale to him of the said two third parts of the said rent-charge or fee-farm rent, to take effect in possession upon the death of the said lunatic, for the sum of 250*l.*; and certain deeds relating to the title to the said two third parts of the said rent-charge or fee-farm rent, were then delivered up to the said Hugh Wade Gery; and thereupon an agreement was entered into and signed by and between the said Nathaniel Humfrey and Hugh Wade Gery, of which the following is a copy:—

“Agreement made the 31st day of March, 1831, between the Rev. Nathaniel Humfrey, of Thorpe Mandeville, in the county of Northampton, of the one part, and the Rev. Hugh Wade Gery, of Bushmede Priory, in the county of Bedford, clerk, of the other part:

“Whereas, Robert Humfrey, Esq., a lunatic, the eldest brother of the said Nathaniel Humfrey, is seised, as of fee, of two third parts of a yearly rent-charge or fee-farm rent of 20*l.* 5*s.*, issuing and payable out of certain hereditaments formerly belonging to the dissolved priory of

*572] Bushmede, in the county of Bedford: And whereas, the said Nathaniel Humfrey is the presumptive heir of the said Robert Humfrey: And whereas, the said Hugh Wade Gery has contracted for the purchase, at or for the price or sum of 250*l.*, of the said two third parts of the said rent of 20*l.* 5*s.*: And whereas the said two third parts of the said rent of 20*l.* 5*s.* will necessarily continue payable to the said Robert Humfrey, or the committee of his estate, during his life: And whereas, in pursuance of the said contract, the said Hugh Wade Gery has, on the day of the date of these presents, paid to the said Nathaniel Humfrey the sum of 250*l.* purchase-money; and the said Nathaniel Humfrey has executed a bond, bearing even date with these presents, for securing the payment to the said Hugh Wade Gery, his executors, administrators, or assigns, of the sum of 250*l.*, with interest after the rate of 5*l.* *per cent. per annum*: Now, these presents witness that the said Nathaniel Humfrey doth hereby agree with the said Hugh Wade Gery that the person or persons upon whom the said two third parts of the said rent of 20*l.* 5*s.* shall devolve upon the death of the said Robert Humfrey, shall and will, within the space of six calendar months from his death, at the expense of the said Nathaniel Humfrey, or of his estate, deduce a marketable title to the said two third parts of the said rent of 20*l.* 5*s.*, and that all necessary parties shall and will, at the expense of the said Hugh Wade Gery, or his estate, convey the said two third parts of the said rent to the said Hugh Wade Gery, and his heirs, or as he or they may direct: And it is hereby agreed that the said Hugh Wade Gery and his heirs shall be entitled to all such payments as shall accrue in respect of

the said two third parts of the said rent of 20*l.* 5*s.*, from and after the decease of the said Robert Humfrey: And it is hereby agreed and declared that the said bond has been *so given by the said Nathaniel Humfrey to the said Hugh Wade Gery, for the purpose of [*573 securing interest for the said sum of 250*l.*, after the rate aforesaid, from the day of the date of these presents up to the time from which the said two third parts of the said rent shall begin to accrue to the said Hugh Wade Gery, or his heirs, according to the intent of these presents; and also the repayment of the said sum of 250*l.*, in case default shall be made in deducing a good title to the two third parts of the said rent, or in procuring the concurrence of all necessary parties in the conveyance of the said two third parts of the said rent to the said Hugh Wade Gery and his heirs, according to the stipulations aforesaid, together with such costs as may be incurred by the said Hugh Wade Gery, or his estate, in or about the intended sale of the said two third parts of the said rent: And it is therefore agreed that the said bond shall not be put in suit during the joint lives of the said Robert Humfrey and Nathaniel Humfrey, unless one year's interest for the said sum of 250*l.* shall be in arrear for the space of two calendar months: Provided always, that, in case such arrear of interest should accrue, or in case the said Nathaniel Humfrey should depart this life in the lifetime of the said Robert Humfrey, it shall be lawful for the said Hugh Wade Gery, his executors or administrators, to enforce payment of the said principal sum of 250*l.*, together with such interest as may be due for the same; and, upon the repayment of the said principal sum, with such interest as aforesaid, this present contract for sale shall be determined: Provided always, that, in the event of the completion of the said purchase, and after all interest in respect of the said principal sum of 250*l.* shall have been paid, the said bond shall be delivered up by the said Hugh Wade Gery, his executors or administrators, to be cancelled. As witness, &c.

*A bond was also executed by the said Nathaniel Humfrey, of [*574 which the following is a copy:—

[Here followed a bond, in the penal sum of 500*l.*, conditioned for payment of 250*l.* and interest.]

The said two third parts of the said rent-charge or fee-farm rent, so far as the same accrued due before and until the end of March, 1831, were, from time to time, before the end of that month, paid by the owner of the said lands for the time being to the owner of the said two third parts for the time being, or to some person claiming the same on his behalf, for his use.

The said Hugh Wade Gery died on the 12th of January, 1831, intestate, leaving the said William Hugh Wade Gery, his heir-at-law, who then became, and has ever since been, and is now, entitled to the said lands out of which the said rent-charge or fee-farm rent is payable, and seized in fee of such lands.

On the 11th of January, 1841, a commission in the nature of a writ *de lunatico inquirendo* was duly issued by the lord high chancellor of Great Britain, to inquire of the lunacy of the said Robert Pargiter Humfrey; and, by the inquisition duly taken thereunder, on the 2d of February, 1841, it was duly found, as the truth is, that he was then a lunatic and of unsound mind, and incapable for the management of himself and his affairs, and had been so continually from the 2d of July, 1805.

By an order of the lord high chancellor of Great Britain, afterwards, in the same year 1841, duly made in the matter of the said lunacy, the said Edward Cooper was appointed the committee of the person and estate of the said lunatic; and all his estate, effects, and property whatsoever, including his estate and interest in the two third parts of the said rent-charge or fee-farm rent, became, on the 10th of July, 1841, and are, duly vested in the said Edward Cooper, as such committee of the said lunatic's estate.

*575] Neither any payment of, or on account of the said rent-charge or fee-farm rent, or any part thereof, nor any satisfaction for the same, has been made at any time since the end of March, 1831; nor, since that time, has there been any written acknowledgment relating thereto.

The said lands are, and during all the time aforesaid have been, worth much more than 50*l. per annum*: and have, ever since the said William Hugh Wade Gery became the owner thereof, yielded and produced to him more than 50*l. per annum*, clear of all deductions.

The said William Hugh Wade Gery claims the benefit of the 42d section of the statute hereinafter mentioned, in respect of the arrears hereinafter mentioned, which are claimed from him by the said Edward Cooper, as the committee of the said lunatic's estate.

The question for the opinion of the court is—whether the said Edward Cooper and Robert Pargiter Humfrey, or either of them, are or is, in the present year, 1847, or were or was in the year 1844, entitled to recover the arrears of the said two third parts of the said rent-charge or fee-farm rent of 20*l. 5s.*, which accrued due from the 29th of September, 1831, to the 29th of September, 1837, inclusive, or any, and what part, of such arrears, notwithstanding s. 42 of the statute 3 & 4 W. 4. c. 27, intituled “An act for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto;” and whether by distress or action, or in each mode.

The case was argued in Trinity term last, before WILDE, C. J., COLTMAN, J., MAULE, J., and CRESSWELL, J.

Talfourd, Serjt., for the plaintiffs. Two questions arise in this case,—first, whether the limitation in the 42d section of the 3 & 4 W. 4. c. 27, applies to the fee-farm rent created by the grant of King
*576] Henry the *Eighth,—secondly, whether the statute has repealed

the protection given to every kind of disability. But for that section, it is quite clear the lunatic would be entitled to recover the arrears claimed in this action. The 2d section of the statute enacts, "that after the 31st of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." In *James v. Salter*, 3 N. C. 544, 4 Scott, 168, 5 Dowl. P. C. 496, TINDAL, C. J., expressed an opinion that this clause did not apply to arrears of rent, but to an action to recover the rent itself. It certainly is difficult to say that the 2d section can apply to arrears of rent, regard being had to the 42d, which enacts, "that, after the said 31st of December, 1833, no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided, nevertheless, that, where any prior mortgagee, or other encumbrancer, shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before *an action or suit shall be brought by any person entitled to a subsequent mortgage or other encumbrance on the same land, the person entitled to such subsequent mortgage or encumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or encumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years." It would be strange if the exceptions and disabilities in the earlier sections were not to be imported into that section. It is submitted that the present case falls within the 3d section of the 3 & 4 W. 4, c. 42, which enacts, "that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt, or *scire facias*, upon any recognisance, and also all actions of debt upon any award, where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and

limitation hereinafter expressed, and not after, that is to say, the said actions of debt for rent upon an indenture of demise, or covenant, or debt upon any bond or other specialty, actions of debt, or *scire facias*, upon recognisance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years *578] after the end of this present session, or within six *years after the cause of such actions or suits, but not after: Provided that nothing herein contained shall extend to any action given by any statute, where the time for bringing such action is or shall be by any statute specially limited." In *Paget v. Foley*, 2 N. C. 679, 3 Scott, 120,(a) this court held that the limitation in actions of covenant for arrears of rent under indenture is governed by the 3 & 4 W. 4, c. 42, s. 3,—that being virtually a repeal *pro tanto* of the 3 & 4 W. 4, c. 27, s. 42. TINDAL, C. J., there says: "In giving judgment for the plaintiffs in this case, I am disposed to rest the opinion I am about to pronounce, solely on the construction of the 3 & 4 W. 4, c. 42, s. 3. But, at the same time, I must observe, that, if called upon to decide whether or not the present case fell within the prior enactment, 3 & 4 W. 4, c. 27, s. 42, I should feel disposed to hold the case not to be within that section. That act was passed 'for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto:' and it contains enactments much more pertinent to charges on land, than to mere conventional rents; for, by the 1st section, it is enacted that 'the word *rent* shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land, except moduses or compositions belonging to a spiritual or eleemosynary corporation sole.' This seems to show that the act intended to deal with a subject-matter having no affinity to rent reserved upon an indenture. The second section provides that 'no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall *579] *have first accrued to some person through whom he claims.' It is clear, that, in that section, the word '*rent*' is used with reference to charges on land, fee-farm rents, &c., for which an assise would lie. The 36th section abolishes all real and mixed actions, except writs of right of dower, or writs of dower *unde nihil habet*, or *quare impedit*, or ejectment: and the act then proceeds to make regulations to govern the amount of damages. Section 40 enacts 'that no action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon, or payable out of, any land or rent, at law or in equity, or any legacy, but

(a) And see *Du Vigier v. Lee*, 2 Hare, 326; *Dearman v. Wycho*, 9 Simons 574

within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of, the same, unless,' &c. Section 41, which relates to dower, enacts, 'that no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit, for a longer period than six years next before the commencement of such action or suit.' When, therefore, the clause that immediately follows provides 'that no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent,' I should rather feel inclined to refer it to arrears of rent of the description before mentioned in the act. It is, however, unnecessary, on the present occasion, to give a definite opinion upon the point; for, it seems to me to *be perfectly clear, that, if rent accruing under an indenture was intended to be embraced [*580 by the 3 & 4 W. 4, c. 37, s. 42, the subsequent enactment in the 3 & 4 W. 4, c. 42, s. 3, expressly takes it out of the operation of the former." BOSANQUET, J., however, said, that, if the case had rested upon the 42d section of the 3 & 4 W. 4, c. 27, he should have entertained a strong opinion in support of the application of the six years' limitation to that case. If *this* be an action for rent reserved by a *specialty*, *Paget v. Foley*,—which is adopted by the Court of Queen's Bench in *Strachan v. Thomas*, 12 Ad. & E. 536, 4 P. & D. 229,—is a distinct authority in favour of the plaintiffs. [MAULE, J. Distresses are not limited by the 3 & 4 W. 4, c. 42; but they are, by the 3 & 4 W. 4, c. 27.] Exactly so. The 3 & 4 W. 4, c. 27, contains certain provisions with regard to persons under disability. Section 16 enacts, "that, if, at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, that is to say, infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid, shall have ceased to be under any such disability, or shall have died, which shall have first happened." And the 17th section provides and enacts, "that no entry, distress, or action shall be made or brought by any person who, at the time at which his *right to make an entry or distress, or to bring an action to recover any [*581

land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired." It would be extraordinary, indeed, if these words were to be held to repeal all previous statutes of limitations. The language of the 21 Jac. 1, c. 16, s. 1, is not merely exceptive: that section enacts "that no person or persons that now hath any right or title of entry into any manors, lands, tenements, or hereditaments now held from him or them, shall thereinto enter, but within twenty years next after the end of this present session of parliament, or within twenty years next after any other title of entry accrued; and that no person or persons shall at any time hereafter, make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same; and, in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made, any former law or statute to the contrary, notwithstanding." And section 2 provides, "that, if any person or persons that is or shall be entitled to such writ or writs [of formedon], or that hath or shall have such right or title of entry, be or shall be at the time of the said right or title first descended, accrued, come, or fallen, within the age of one and twenty years, *feme covert*, *non compos mentis*, imprisoned, or beyond seas, that then such person and *persons, and his and their heir and heirs, shall or may, *582] notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this act; so as such person and persons, or his or their heir and heirs, shall, within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years." All these statutes are to be read as one code. Upon the authority of *Paget v. Foley*, therefore, it is submitted that this is a rent within the meaning of the 3 & 4 W. 4, c. 42, s. 3, and, consequently, is excepted out of the operation of the 3 & 4 W. 4, c. 27, s. 42.

Manning, Serjt., contrâ. The 16th and 17th sections of the 3 & 4 W. 4, c. 26, show that the attention of the legislature was drawn to the necessity of excepting the disability of lunacy, &c.: but they expressly confine it to the twenty years' claim. The 21 Jac. 1, c. 16, has no analogy to the subject-matter of this statute: and the court will not extend it by equity. It is a rule of the civil law, that "*contra non valentem agere non currit præscriptio*." But it has been decided over and over again, that, in our law, it is exactly the reverse. This case does not fall

within the 3 & 4 W. 4, c. 42, but is expressly governed by the 42d section of the 3 & 4 W. 4, c. 27. This view is fortified by two decisions of Sir E. SUGDEN upon the 3 & 4 Vict. c. 105 (Irish). The 32d section of that statute is in precisely the same words as the 3d section of the 3 & 4 W. 4, c. 42: and the 33d enacts, "that, if any person or persons that is or are or shall be entitled to any such action or suit, or to such *scire facias*, is or are or shall be at the time of any such cause of action accrued within the age of twenty-one years, *feme covert*, *non compos mentis*, or *beyond the seas, then such person or persons shall be [*583 at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discover, of sound memory, or return from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and that, if any person or persons against whom there shall be any such cause of action, is or are or shall be at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited, after the return of such person or persons from beyond the seas." In *Harrison v. Duignan*, 2 Drury & Warren, 295, 1 Con. & L. 376, A. granted an annuity to a trustee for B. for his life, and in the conveyance entered into a personal covenant with B. for payment of the same: A. subsequently sold, subject to the annuity: and it was held,—on a bill filed by B. against the purchasers to raise the arrears thereof (A. or his personal representative not being a party to the cause),—that, though there was an obligation imposed on the purchaser to indemnify A., yet that the court would not thus indirectly enforce this obligation, and thereby, in effect, evade the operation of the statute of limitations; and, accordingly, the account was limited to a period of six years prior to the filing of the bill. And in *Hughes v. Kelly*, 3 Drury & Warren, 482, 2 Con. & L. 223, by deed executed in the year 1809, certain lands were conveyed, subject to the payment of a sum of money, which the grantee thereby covenanted with the grantor to pay to third persons: and it was held, that, notwithstanding the covenant, only six years' arrears of interest could be recovered; and that the statute 3 & 4 W. 4, c. 27, s. 42, is not repealed by the 3 & 4 Vict. c. 105, s. 32. *The lord chancellor, (a) [*584 in giving judgment, said: "I have to consider the operation of the statute 3 & 4 W. 4, c. 27, and the clause of the statute 3 & 4 Vict. c. 105, (s. 32,) as to the limitation of the right to bring actions upon specialties. By the 40th section of the 3 & 4 W. 4, c. 27, it was enacted 'that no action or suit shall be brought to recover any sum of money secured by any mortgage, &c., but within twenty years after a present right to recover the same.' That section, therefore, provides that the principal shall not be recoverable after twenty years, except in the several

(a) Sir EDWARD SUGDEN.

cases enumerated therein : then follows the 42d section, which embraces only the interest of the sums provided for in the 40th section. If, therefore, the law rested upon that act alone, it is plain that a distinct remedy was intended to be provided for these two subjects ; that is to say, that, though the principal sum itself might be recoverable within twenty years, yet only six years' arrears of interest could be recovered upon that principal sum. Therefore, that which was supposed at the bar to have been so anomalous and inconsistent, was not so considered by the legislature. Then came the statute 3 & 4 W. 4, c. 42, only in force in England, but the 3d section of which has been recently introduced into this country by the 3 & 4 Vict. c. 105 ; and this confines the period of bringing an action for rent or† on a specialty to twenty years. Now, a great deal of the difficulty which has arisen upon the construction of these statutes, in England, sprung from this circumstance,—that the later act, 3 & 4 W. 4, c. 42, was not framed by the persons who prepared the former act. If the later act had not passed, money secured on land, although also secured by bond or covenant, could not have been recovered after twenty *585] years, nor could more than six years' arrears of interest have been recovered. The first act provides for both cases. In *Doe d. Jones v. Williams*, 5 Ad. & E. 291, 296, 6 N. & M. 816, Mr. Justice LITTLEDALE said : 'The 40th section relates to actions brought to recover the money ; and those actions, in the case of mortgages, are either upon the covenant usually inserted in the mortgage deed, or on the bond which commonly accompanies it.' It never occurred to that very learned judge that the 40th section did not apply to specialties. In *Paget v. Foley*, the court of Common Pleas held that rent reserved upon an indenture of demise was not within the operation of 3 & 4 W. 4, c. 27, but fell within the 3 & 4 W. 4, c. 42. Mr. Justice BOSANQUET to some extent differed from the rest of the court : he seemed to think, that, if the case had rested on the 3 & 4 W. 4, c. 27, and the 3 & 4 W. 4, c. 42, had never passed, the right to recover in that case would have been confined to six years, within the meaning of the 3 & 4 W. 4, c. 27 : but he agreed with the rest of the court on the point upon which they decided the case, that the 3 & 4 W. 4, c. 27, was, in fact, removed or repealed by the 3 & 4 W. 4, c. 42. It is a singular circumstance, that the 3 & 4 W. 4, c. 42, had, in fact, a prior operation to the 3 & 4 W. 4, c. 27, although passed subsequently to it ; and this statute (3 & 4 W. 4, c. 27), when it came into force, found the 3 & 4 W. 4, c. 42, in full operation. In Ireland, however, the law stands on a different footing ; for, the provision in the 3 & 4 W. 4, c. 42, to which I have been adverting, was not introduced into this country, until it was embodied in the recent statute of Victoria ; and it is to be regretted that it was thus introduced without some modification. The statute of Victoria found the 3 & 4 W. 4, c. 27.

in full operation in this country. *My clear opinion upon the effect of the 3 & 4 W. 4, c. 27, is, that it expressly applies, in a [*586 case like the present, both to the principal and interest, although the money is also secured by a bond or covenant. In *Strachan v. Thomas*, there was a little more difficulty than in *Paget v. Foley*. That was the case of an annuity, which fell directly within the terms of the 3 & 4 W. 4, c. 27; for, in the first section, which is the glossary of the act, the word 'rent' is defined to extend to all annuities and periodical payments. The learned chief justice, however, in delivering judgment, merely said,— 'The present is not the usual case of reservation of rent upon a lease, and, so far, it is not properly an indenture of demise; it is a rent-charge, and, as such, falls within the 42d section of the 3 & 4 W. 4, c. 27: but, notwithstanding that, we are of opinion that it falls within the 3d section of the 3 & 4 W. 4, c. 42, as being an action of covenant on a specialty.' Now, this case went far beyond *Paget v. Foley*, which was held to fall within the provisions of the 3 & 4 W. 4, c. 42; whereas, in the later case, the court held that the case was within the 3 & 4 W. 4, c. 27, and also within the 3 & 4 W. 4, c. 42, by reason of the action being one upon a specialty. It appears to me that the two statutes, being *in pari materia*, should be construed together, and, if possible, reconciled. There is this important distinction between the case which I have to consider, and both *Paget v. Foley* and *Strachan v. Thomas*; in both of these cases there was but one subject,—the rent in the one, and the rent-charge in the other: it was, therefore, impossible to say that there could be a recovery of the same subject both within twenty years and within six years. But, in the present case, I have to deal with two subjects, the principal sum secured, which is clearly within the 40th section of the 3 & 4 W. 4, c. 27, and the interest upon that principal sum, which falls within the *42d section. It is singular that the court of Exchequer in this country(a) came to a different conclusion from the court of Common Pleas in *Paget v. Foley*; for, in *Bruen v. Nowlan*, 1 Jebb & S 346, n., they held that the 3 & 4 W. 4, c. 27, did extend to rent reserved upon an indenture of demise. There was then no conflict of statutes; for, at that time, there was no other statute in force than the 3 & 4 W. 4, c. 27; the statute of Victoria had not passed, and the 3 & 4 W. 4, c. 42, did not extend to this country.(a) I think the court of Exchequer decided in that case rightly; and it agrees with the opinion of Mr. Justice BOSANQUET, to which I have already adverted. But the passing of the later act opens to a different view. * * The question then is, does this act of Victoria, in the particular case of a charge, or a mortgage with a covenant for payment, enlarge the remedy of the creditor as to interest? I am of opinion that it does not. I think the case falls within the 3 & 4 W. 4, c. 27, and that the right to arrears of interest

(a) Ireland.

must be confined to six years. I do no violence to the statute of Victoria by that construction. That act was not intended to repeal the former one. There are many cases in which the remedy provided by the statute of Victoria may come into operation, without breaking in upon the former statute. Both may, and ought to, be construed together. The period of limitation is twenty years in each: and, though there are savings in the one act which are not to be found in the other, yet it does not appear to me that these provisions prevent me from holding that this case falls, as to interest, within the 3 & 4 W. 4, c. 27." [MAULE, J. The ordinary form of expression in statutes of limitation,—in the 21 Jac. 1, c. 16, for instance,—is, that all actions, &c., shall be commenced *588] within a certain limited period, and not after. The phraseology *of the 3 & 4 W. 4, c. 27, s. 42, is different: it is, that no arrears of rent, &c., shall be recovered, &c., but within six years next after the same respectively shall have become due, &c.: not that you must bring your action within six years; but that you must *recover* the arrears within six years, or not at all. The 41st section,—which, without any exception or limitation, enacts, "that, after the said 31st of December, 1833, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit, for a longer period than six years next before the commencement of such action or suit,"—tends to throw a little light upon the subject.] This case is not within the 3 & 4 W. 4, c. 27, s. 3. [MAULE, J. Can debt be maintained for a rent in fee?] The remedy for the *owner* of the rent is by distress.(a) [MAULE, J. May not effect be given to the 3 & 4 W. 4, c. 27, s. 42, and the 3 & 4 W. 4, c. 42, s. 3, in this way,—by holding the right to recover the rent to be limited to six years, provided twenty years have not elapsed since the title first accrued, and, after that period has elapsed, to be gone altogether?] We admit the plaintiffs' right to recover six years' arrears. If the case had rested on the 3 & 4 W. 4, c. 27, s. 42, it is clear that the plaintiffs' claim would have been barred at the end of six years. That provision is modified by the 3d section of the 3 & 4 W. 4, c. 42, in the manner just suggested. A party who has slept on his rights for a period short of twenty years, is not barred of his remedy, but is allowed to recover six years' arrears only: but, if he has slept for a period exceeding twenty years, he is altogether barred. [MAULE, J. Like an action of ejectment: the plaintiff has twenty years to bring his action; but he can only recover the mesne profits for six years.] *589] *Precisely so. No action of debt or covenant would lie on these letters-patent: the grantee does not covenant.(b) There being no provision in the later act extending the disability of lunacy to a case

(a) But, by 32 H. 8, c. 37, debt lies for his executor, &c.

(b) By accepting letters-patent, the grantee becomes bound by any covenants contained therein. *Brett v. Cumberland*, 1 Roll. Rep. 359, Cro. Jac. 355, 521.

of this sort, and the court having no power to extend it by analogy, the plaintiffs are not entitled to recover the arrears in question.

Edward Cooper, as *committee* of the estate of the lunatic, had an *office* in relation to the real property of the lunatic, but had no *estate* or *interest*: *Knipe v. Palmer*, 3 Wils. 130; *Tyrell v. Jenner*, 5 Bingh. 283, 3 M. & P. 648.

Talfourd, Serjt., in reply. In *Grant v. Ellis*, 9 M. & W. 113, a question arose whether the statute 3 & 4 W. 4, c. 27, applied to rent reserved on an indenture of demise; and it was held, that such a rent was not within that statute, for, that it only applied to freehold rents. Upon the converse of that case, therefore, it can scarcely be contended here that this is not a rent coming within the statute. [MAULE, J. The 36th section of the 3 & 4 W. 4, c. 27, abolishes real actions, with a single exception. The succeeding sections, down to 39, inclusive, relate to the realty. The 40th section enacts, "that, after the said 31st of December, 1833, no action or suit or other proceeding shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of, the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some *acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action, or suit, or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given." Then comes section 42, which applies to *arrears* of rent,—the recovery of *the rent itself* having already been provided for by section 2.] The words of the 3d section of the 3 & 4 W. 4, c. 42, are precise and positive. The decision in *Paget v. Foley* proceeded upon that section: and the main question is, whether that case governs the present, or whether the court will adopt the view taken in the two Irish cases—*Harrison v. Duignan* and *Hughes v. Kelly*. [MAULE, J. You clearly cannot sue in covenant. You are, therefore, driven to rely on your capacity to sue the *terre-tenant* in an action of debt.] Undoubtedly that is so.

The following certificate was afterwards sent to Vice-Chancellor KNIGHT BRUCE:—

"This case has been argued before us by counsel. We have considered it, and are of opinion that Edward Cooper and Robert Pargiter Humfrey were not, nor was either of them, in the year 1847, or the year 1844, entitled to recover the arrears of the two third parts of the rent-charge or fee-farm rent of 20*l.* 5*s.*, which accrued due from the 29th of

September, 1831, to the 29th of September, 1837, inclusive, or any part of such arrears.

"THOS. WILDE.

"T. COLTMAN.

"W. H. MAULE.

"C. CRESSWELL."

9th December, 1848.

*591] *IN THE EXCHEQUER CHAMBER.

WAKLEY v. HEALEY, in Error. Feb. 9.

In case for a libel, the declaration stated, by way of inducement, that the plaintiff was a barrister and the editor and proprietor of a weekly publication called "The Medical Times," and also secretary to the committee of "Poor-Law Medical Officers," and to the "Convention of Poor-Law Medical Officers;" that there existed an association called "The National Institute of Medicine;" that certain medical poor-law-union officers were endeavouring to bring about an amelioration of the then-existing system of poor-law medical relief; and that "The National Institute of Medicine" was willing to lend its assistance to the medical poor-law-union officers, and to allow that body the use of certain rooms held by them.

The declaration then, in the first count, alleged that the defendant, in a weekly publication called "The Lancet," published, "of and concerning the plaintiff," the following:—"In our last, we advised the medical officers of the poor-law-unions to adopt an independent course, to trust to the justice of their cause, and to their own legitimate exertions, for an amendment of the grievances of which they so justly complain;" and, after cautioning those persons not to suffer "The National Institute of Medicine," or "The Committee of Poor-Law Medical Officers," to meddle with their affairs, the libel proceeded—"We would exhort the medical officers to avoid the traps set for them by desperate adventurers (thereby meaning the plaintiff, among others), who, participating in their efforts, would inevitably cover them with ridicule and disrepute."

The second count stated that the defendant further published "of and concerning the plaintiff" the following,—"We need not here dwell upon the impolicy of the connexion between the present agitation and 'The National Institute,'—a body which has disgusted the government,—and with other persons not belonging to the profession (thereby meaning the plaintiff, as such barrister as aforesaid), and whose weekly vocation it is to bring everything belonging to the profession into disrepute and contempt" (thereby meaning that the plaintiff was in the habit as editor of the said weekly publication called "The Medical Times," as aforesaid, of bringing the medical profession into disrepute and contempt).

The third count described the plaintiff as "a quack lawyer and mountebank," and an "impostor;" and the fourth set out matter tending to hold the plaintiff up to ridicule.

After verdict for the plaintiff upon all these counts, with entire damages:—

Held, by the court of error,—that the words charged in the first count were libellous:

Held also, that the words charged in the second count were libellous, without the aid of the innuendo: and

Held also, that the count was not objectionable, by reason of the want of an averment that the libel was published of and concerning the plaintiff as editor of the weekly publication referred to,—that being sufficiently shown by the libel itself.

Semble, that this count would have been good without any special averment.

CASE, for a libel. The first count of the declaration stated, that Healey, the plaintiff (below), before and at the time of the committing *592] of the grievances by Wakley, *the defendant (below) thereafter mentioned, was a barrister, and the editor and proprietor of a certain weekly publication called "The Medical Times;" that the plain

tiff (below), before the committing of the grievances by the defendant (below) thereafter mentioned, was the secretary to the committee of "Poor-Law Medical Officers," and to the "Convention of Poor-Law Medical Officers;" that, also, before the committing of the said grievances, a certain association, consisting of medical men and others, existed, which association was called by the name of, and known as, "The National Institute of Medicine;" that the said association so called as aforesaid, was, before the committing of the grievances by the defendant (below) thereafter mentioned, possessed of certain vacant rooms and apartments; that a certain large number of medical poor-law-union officers were, before the committing of the grievances by the defendant (below) thereafter mentioned, interested in, and endeavouring to bring about, an amelioration of, the then-existing system of poor-law medical relief; that the said association so called "The National Institute of Medicine" as aforesaid, was then willing to lend their assistance to, and co-operate with, the said medical poor-law-union officers who were so as aforesaid interested in, and endeavouring to bring about, such an amelioration of the then-existing system of poor-law medical relief, and the said association was willing to allow the said medical poor-law-union officers to use gratuitously the said rooms and apartments of *the said association, for the purpose aforesaid, and the plaintiff (below), before [*593 the committing by the defendant (below) of the grievances next thereafter mentioned, had recommended the said rooms and apartments to the said medical poor-law-union officers, for the said purpose; that the plaintiff (below) always had been, and then still was, a good and faithful subject of this realm, and as such had always behaved and conducted himself, and, until the time of the committing by the defendant (below) of the grievances thereafter mentioned, was always reputed, esteemed, and accepted such, by and amongst his neighbours and other worthy subjects of this realm, and had never been guilty of, nor up to the time of the committing of the several grievances by the defendant (below) thereafter mentioned, been suspected of being guilty of, any improper or immoral conduct, or of the offences or misconduct thereafter mentioned to have been charged upon, or imputed to, him by the defendant (below) or of any other offences or misconduct; and that, by means of the said several premises, the plaintiff (below), before the committing of the grievances thereafter mentioned, had deservedly obtained the good opinion of, and credit with, all his neighbours and other good and worthy subjects of this realm to whom he was in any wise known: Yet that the defendant (below), well knowing the premises, but greatly envying the happy state and condition of the plaintiff (below), and contriving, and wickedly and maliciously intending to injure him in his good name, credit, and reputation, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbours and other good and worthy subjects of this realm, and to cause it be suspected

and believed by those neighbours and subjects that the plaintiff (below) had been and was guilty of the *misconduct and offences there-
 *594] inafter mentioned to have been falsely and maliciously charged upon the plaintiff (below), and to vex, harass, and oppress the plaintiff, did theretofore, to wit, on the 9th of October, 1847, in a certain number of a certain weekly publication, called "The Lancet," falsely and maliciously and wickedly compose and publish, and cause and procure to be published, of and concerning the plaintiff, a certain false, scandalous, malicious, and defamatory libel, one part of which said libel contained, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff (below), that is to say—"In our last, we advised the medical officers of the poor-law-unions to adopt an independent course, to trust to the justice of their cause, and to their own legitimate exertions, for an amendment of the grievances of which they so justly complain. This advice is doubly necessary at the present time. When we wrote, there was only one party of a suspicious character, attempting to obtain the management of the poor-law medical agitation, for selfish purposes. Now, there are two quacks in the field; the one recommending Charing Cross; the other, the rooms of the National Institute (meaning the vacant rooms and apartments of the said association called the National Institute of Medicine, so recommended by the plaintiff below as aforesaid); the one (thereby meaning the plaintiff below), offering house-room gratis; the other, attempting to levy contributions on the poor-law medical purse. If the poor-law-union suffer either of these parties to intermeddle with
 *595] their affairs, their cause will be inevitably ruined:"(a) and another *part of which libel contained the false, scandalous, malicious, and defamatory matter following, *of and concerning the plaintiff* (below) that is to say, "As a mode of strengthening their cause, the poor-law officers should, in every union, obtain the co-operation of their professional brethren as much as possible. We have already urged upon the latter the duty, and, indeed, the self-interest, of making common cause with them. Above all, we would exhort the medical officers to avoid the traps set for them by *desperate adventurers* (thereby meaning the plaintiff, among others), who, participating in their efforts, would inevitably cover them with ridicule and disrepute."

The second count stated, that the defendant (below), further contriving, and wickedly and maliciously intending as aforesaid, theretofore, to wit, on the 16th of October, 1847, did, in a certain other number of the said weekly publication called "The Lancet," falsely and maliciously compose and publish, and cause to be published, a certain other false, scandalous, malicious, and defamatory libel of and concerning the plaintiff (below), that is to say—"We need not here dwell upon the impolicy

(a) As to this portion of the alleged libel, a verdict was found for the defendant (below), on the plea of not guilty.

of the connexion between the present agitation and the National Institute (meaning thereby the said association called the National Institute of Medicine),—a body which has disgusted the government,—and with other persons not belonging to the profession (thereby meaning the plaintiff below, as such barrister as aforesaid), and *whose weekly vocation it is to bring everything belonging to the profession into disrepute and contempt*" (thereby meaning that the plaintiff, below, *was in the habit, as editor of the said weekly publication called The Medical Times as aforesaid, of bringing the medical profession into disrepute and contempt*).

*The third count stated that the defendant (below), further contriving and intending as aforesaid, did, on the 23d of October, [*596 1847, in a certain other number of the said weekly publication called "The Lancet," of which the defendant (below) was so as aforesaid proprietor,(a) falsely, wickedly, and maliciously publish, and cause and procure to be published,(b) a certain other false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff (below), that is to say—"We trust the meeting on the 27th will be united, numerous, and powerful. If it be what it ought to be, it will, no doubt, receive the support of the entire daily press; and thus, an immense impetus will be given to the good cause. Nowhere should the press be neglected. Daily or weekly, metropolitan or provincial,—wherever poor-law medical men have interest, a shot should be fired, and publicity given to their exertions. One indication has given us sincere satisfaction, viz. the omission in the recent advertisements of the name of *the quack lawyer and mountebank* (thereby meaning the plaintiff, below, as such barrister as aforesaid), who intruded himself upon the poor-law medical men, and whose intrusion, if permitted to continue, must have tended to damage the question materially with all those who know the character of *the impostor* (thereby meaning the plaintiff below). We trust this is an indication on the part of the union surgeons, of their resolve to cast off all excrescences that might hinder the adhesion, and slacken the enthusiasm, of their supporters. There *must be no rump in the matter; no discreditable alliances." [*597

The fourth count stated, that just before the committing of the grievances next thereafter mentioned, to wit, on the 27th of October, 1847, a certain meeting of the said medical poor-law officers had been held, and the same meeting had been and was convened under the auspices of the plaintiff (below), amongst others, and at such meeting the plaintiff (below) acted as, and was, the secretary, as the defendant (below), at the time of the committing of the said grievances, well knew: Yet that the defendant, further contriving and intending as aforesaid, did, on the 30th of October, 1847, in a certain other number of the said weekly pub-

(a) This is the first time he is so described.

(b) Not saying "of and concerning the plaintiff."

lication called "The Lancet," falsely, wickedly, and maliciously publish, and cause and procure to be published, a certain other false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff,—“Every part of the three kingdoms,—England, Ireland, and Scotland,—is furnishing its quota of resistance to the unjust system of medical poor-law relief which universally prevails. The meeting of English poor-law surgeons on Wednesday, was not, as it might and should have been. There were present about one hundred and fifty, including lookers on. We firmly believe, that, but for the sinister influences we have before referred to, there would have been a thousand medical men at the meeting,—one-third, instead of one-twentieth, of the medical poor-law officers of England and Wales! But it would be as wise to convene a meeting of the merchants of London, in the present panic, under the superintendence of Joseph *Ady and Ikey *598] Solomons, as it was to convene a medical meeting under the auspices of Healey (thereby meaning the plaintiff below) and Ross. At the commencement of the meeting (thereby meaning the said meeting so convened as aforesaid), the self-appointed secretary (thereby meaning the plaintiff below) would have taken up the whole day, by reading a confused list of meetings and resolutions which have been held and already reported, some of them weeks ago. However, the restlessness of the meeting warned the able chairman, Dr. Burton, of Walsall; and the briefless quack secretary (thereby meaning the plaintiff below) was unceremoniously snuffed out.”

There was a fifth count, on which the jury found for the defendant.

The declaration then concluded—“By means of the committing of which said several grievances by the defendant (below) as aforesaid, the plaintiff (below) hath been and is greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace with and amongst all his neighbours and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the plaintiff in the premises were unknown, had, on account of the committing of the said grievances by the defendant (below), from thence hitherto suspected and believed, and still do suspect and believe, the plaintiff (below) to have been and to be a person guilty of the said improper conduct so charged upon him by the defendant, and have, by means of the committing by the defendant of the grievances hereinbefore mentioned as aforesaid, from thence hitherto wholly refused, and still do refuse, to have any transaction, acquaintance, or discourse with the *599] *plaintiff, as they were used and accustomed to have, and would otherwise have had; and the plaintiff hath been and is, by means of the premises, otherwise greatly injured,” &c.

The defendant pleaded,—first, not guilty; secondly, “as to so much

of the declaration as relates thereto," that the plaintiff was not a barrister and the editor and proprietor of the said weekly publication called "The Medical Times," in manner and form as in the declaration mentioned,—thirdly, "as to so much of the declaration as relates thereto," that the plaintiff was not the secretary to the committee of poor-law medical officers, nor to the convention of poor-law medical officers, in manner and form as in the declaration mentioned. Issue thereon.

At the trial before MAULE, J., at the sittings in Middlesex after last Easter term, the jury returned a verdict for the defendant, on not guilty, as to the first portion of the libel set out in the first count, as also on the issue on not guilty to the last count; and, as to the residue of the first count, as well as upon all the other issues, they found for the plaintiff; and they assessed "the damages of the plaintiff on occasion of the committing of the grievances whereof the defendant has been convicted as aforesaid, at 40s. over and above his costs and charges by him about his suit in that behalf expended, and for those costs and charges 40s."

Judgment having been signed, a writ of error was brought.

The errors assigned were, amongst others,—that the latter portion of the alleged libel in the first count was not the subject of an action, and was not sufficiently explained by proper introductory statements or averments, nor was the same properly or sufficiently shown, *by proper and sufficient innuendos, or otherwise, to relate or apply to [the plaintiff (below)];—that the second count did not state or set forth any cause of action against the defendant (below), and that none of the innuendos in that count contained, were warranted by any proper inducement or introductory statement, and that, without the aid of those innuendos, it did not appear from or by the said second count to what the supposed libel therein mentioned related, nor did it appear how or in what manner that libel related or applied to the plaintiff (below), or that it did apply to him;—and that the second count did not contain a sufficient or proper averment or statement that the words and matter which followed the words "that is to say," were contained in the supposed libel in that count mentioned, &c.

The case was argued on the 30th of November last, before PARKE, B., ALDERSON, B., PATTESON, J., COLERIDGE, J., WIGHTMAN, J., ERLE, J., PLATT, B., and ROLFE, B.

Bramwell (with whom was *Talfourd*, Serjt.), for the plaintiff in error. The first count is bad: there is no introductory averment, and no innuendo, to show who are the poor-law medical officers alluded to. The only innuendo to point the latter part of the libel, is that in which the plaintiff thinks proper to apply the term "desperate adventurer" to himself. The words are not actionable by themselves, and the plaintiff below had no right thus to enlarge their application for the purpose of making them so. [PARKE, B. The jury have found that the words

were intended to apply to the plaintiff. We are all of opinion that the first count is good. There can be no doubt, that, to say of a man that he is a "desperate adventurer" and sets traps for others, is libellous. Pass on to the next count.]

*601] *There is no *colloquium* in the second count, averring the alleged libel to have been published of and concerning the plaintiff as a barrister, or as the editor of the Medical Times; and, therefore, there is nothing to warrant the innuendos,—apart from which, there is nothing to show to what profession the alleged libel refers; and, if there is, for anything that appears, it may be a laudable thing to show it to be disreputable and contemptible. [PARKE, B. The substance of the charge is, that the plaintiff is a weekly libeller.] That might be so, if there were any prefatory averments to warrant the conclusion. In *Day v. Robinson*, in error, 1 Ad. & E. 554, 4 N. & M. 884, a count in a declaration for slander laid the words as follows,—“You have robbed me of 1s. tan-money;” and the innuendo explained the meaning to be, that the plaintiff had fraudulently taken, and applied to his own use, 1s., received by him for the defendant, being the produce of the sale of some tan sold by the plaintiff for, and as servant to, the defendant: but, inasmuch as the facts stated in this innuendo, were not warranted by any independent introductory averment, it was held to be bad, and the words not in themselves actionable. [ALDERSON, B. Would it have been a libel on Molière, to write of him that his object was,—as suggested by the medical men of his day,—to bring the medical profession into ridicule and contempt?] Possibly, by the aid of apt averments, even that might have been established. Here, there is nothing to apply the imputation to the plaintiff; and, as he himself has given a particular meaning to the statement, the court cannot reject it. “An innuendo is only explanatory of some matter already expressed: it serves to point out,

*602] where *there is precedent matter, but never for a new charge: it may apply what is already expressed, but cannot add, or enlarge, or change the sense of the previous words.”(a) Again, in 2 Wms. Saund. 307, n. (1), it is said, “There seems to be no doubt that words which are not actionable in themselves, but are only so because they are spoken of a person in his profession, office, or trade, must be alleged in the declaration to have been spoken of him in relation to such his profession, office, or trade; otherwise, the declaration contains no cause of action, and judgment will be arrested:” *Harvey v. Martin*, Sir T. Raym. 75; *Walmsley v. Russell*, 6 Mod. 202, per POWELL, J., 2 Salk. 696. The same principle applies to libel. [PARKE, B. In *Harvey v. French*, 1 C. & M. 11, a count for a libel stated that the defendant published a false libel of and concerning the plaintiff, containing, amongst other things, the false, &c., matter of and concerning the plaintiff, that is to

(a) 1 Wms. Saund. 243, n. (4); citing *Rex v. Greepe*, 2 Salk. 513, 1 Ld. Raym. 236, 12 Mod. 139.

say—"Threatening letters. The Middlesex grand jury have returned a true bill against a gentleman of some property, named French" (meaning the plaintiff); "with this, that the said plaintiff will verify, that the said defendant thereby then and there meant to insinuate and have it understood that the plaintiff had been suspected to have been, and had been, guilty of the offence of sending a letter without any name or signature thereto subscribed, directed to one — Trotter, threatening to kill and murder the said — Trotter, a subject of this realm, with a view and intent to extort:" and it was held,—first, that the innuendo at the conclusion of the count was bad,—secondly, that the matter was libellous *without such innuendo, which might be rejected as surplusage.] [*603]

PARKE, B. We are all clearly of opinion that all the counts are good, except the second. As to that, we entertain some little doubt.

Dearsley, for the defendant in error. If the libel in the second count be read, as it ought to be, in immediate connexion with the inducement at the commencement of the declaration, it is clearly shown to have reference to the plaintiff in his profession of a barrister, and in his capacity of editor of the Medical Times. To write of a man, that he is in the weekly habit of publishing libels on a particular profession, is undoubtedly libellous: and the prefatory averments show that the Medical Times is a weekly publication. The innuendo, therefore, is wholly superfluous: the words are libellous in themselves. [PARKE, B. The only question is, whether the words,—“whose weekly vocation it is to bring everything belonging to the profession into disrepute and contempt,”—are susceptible of the meaning ascribed to them, and which the jury have found was intended to be conveyed.] There can be no doubt that the medical profession was intended. The publication in which the libel is found, shows that. [PLATT, B. We cannot take judicial notice that the Lancet is a medical publication.]

Bramwell, in reply. [PARKE, B. If the words are ambiguous, they are to be understood in a sense that will support the verdict, provided they are fairly susceptible of that meaning. PLATT, B. Upon what principle do you reject the innuendo? It does not enlarge the sense of the words.] If the innuendo stands, it *must be confessed that there is a difficulty in saying that the publication is not libellous. [*604] Rejecting it, the count is clearly too vague. *Cur. adv. vult.*

PARKE, B., now delivered the judgment of the court.

The writ of error in this case was argued at the sitting after last Michaelmas term.

The plaintiff had obtained a verdict, with general damages 40*s.*, on a declaration containing several counts for libels; and judgment was given in the court of Common Pleas for the plaintiff

On the argument of the writ of error, Mr. *Bramwell* took objections

to several of the counts ; but they were of no weight as to any count except the second, as to which the court took time to consider.

The inducement at the commencement of the declaration, and which was applicable to all the counts, stated the plaintiff to be a barrister, and the editor and proprietor of a weekly publication, called the Medical Times, and other matters, not necessary to be now referred to.

The second count, the only one the objections to which are to be considered, was as follows :—[His lordship read it.]

The objection to this count was, that the innuendo at the conclusion of it was bad, because the libel was not averred to have been published of and concerning the plaintiff, *as the editor of the said weekly publication* ; and that, to make the count good, there should have been, not merely an inducement stating the fact that he was so, but an averment that the libel was published of him in that character.

Supposing this objection to be well founded, the only consequence is, that the innuendo is to be *rejected: Harvey v. French, 1 C. & *605] M. 11 ; Roberts v. Camden, 9 East, 93 : and the question, then, is, whether the words themselves, without an innuendo, are actionable. After verdict, it must be taken that the jury found that they have been published without lawful excuse, and are such as to be injurious to the plaintiff's character ; as it has been the practice, in modern times, to leave the latter point also to them. And if, in their ordinary acceptance, and without the aid of extrinsic circumstances, the words may be reasonably understood as derogatory to the plaintiff's character, the judgment cannot be arrested : Roberts v. Camden. Here, the imputation is, that it is the vocation, that is, the habitual employment, of the plaintiff, to bring *everything* belonging to the profession (that is, everything, whether worthy of it or not), into disrepute and contempt : and this imputation tends to discredit the plaintiff, and is injurious to his character, whatever means he uses for that purpose. And the jury have found that the words used have that effect. The amount of injury by such an imputation, they had also to estimate : and they have not given large damages.

It may be a question in this case, whether any special averment was necessary, that the libel was of and concerning the plaintiff as editor of the weekly journal ; as the contents of the libel itself sufficiently show that reference : and the cases of Sir Miles Fleetwood v. Curle, Cro. Jac. 557, and Sir John Isham v. York, Cro. Car. 15, and other cases referred to in Mr. Starkie's valuable book on Slander, p. 414, may apply to this : *606] but it is unnecessary to give any opinion on this question. The *innuendo, on that supposition, would be proper : and thus there would be no doubt that the imputation was, that the plaintiff, in his vocation of editor, was a libeller ; and so no question as to the publication being actionable.

Judgment affirmed.(a)

(a) Though defamatory matter may appear only to apply to a class of individuals, yet, if the descriptions in such matter are capable of being, by innuendo, shown to be directly applicable to

any one individual of that class, an action may be maintained by such individual. In such a case, the innuendo does not extend the senso of the defamatory matter, but merely points out the particular individual to whom the matter, in itself defamatory, does in fact apply. Therefore, after verdict, a declaration which recited that the plaintiff was owner of a factory in Ireland, and charged that the defendant published of him, and of the said factory, a libel, imputing that, "in some of the Irish factories (meaning thereby the plaintiff's factory)," cruelties were practised, though there was no allegation otherwise connecting the libel with the plaintiff, was held good. *Le Fanu v. Malcolmson*, 1 House of Lords Cases, 637.

END OF HILARY VACATION.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,

IN
Easter Term,

IN THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

The judges who usually sat *in banco* in this term were—
WILDE, C. J. CRESSWELL, J.
COLTMAN, J. V. WILLIAMS, J.

MEMORANDUM.

IN the course of the last vacation, Mr. Serjeant *Kinglake* received a patent of precedence, to take rank next after Mr. *Rolt*.

The following gentlemen were also appointed Her Majesty's counsel learned in the law:—

Edward John Lloyd, Esq., of Lincoln's Inn.

John Greenwood, Esq., of the Middle Temple.

Richard Malins, Esq., of the Inner Temple.

Frederick Calvert, Esq., of the Inner Temple.

Henry Singer Keating, Esq., of the Inner Temple.

Roundell Palmer, Esq., of Lincoln's Inn.

James Robert Hope, Esq., of the Inner Temple.

*608]

*TOWNE v. LEWIS. April 16.

A., the endorser of a dishonoured bill, having paid the amount to B., the holder, demands the bill from B., who refers him to his (B.'s) attorney. A. refusing to go to the attorney, B. says, "Then call on Saturday, and in the mean time I will get it for you." A. calls on Saturday, but does not obtain the bill:—This is not evidence of a conversion.

TROVER, for a bill of exchange. Pleas, not guilty, and not possessed. The cause was tried before WILDE, C. J., at the sittings at Westminster

after the last term. The facts were as follows :—The plaintiff, as endorser of a bill of exchange, had been sued by the defendant in the Lord Mayor's court, and had paid the amount under an order of that court. He afterwards sent a person to the defendant, to demand the bill, when the defendant told him it was not in his possession, and referred him to his attorney, to whom he had handed it for the purpose of suing upon it. The plaintiff's messenger declining to go to the attorney, the defendant said :—"Then, call on Saturday, and in the mean time I will get it for you." The messenger accordingly called again, on the following Saturday, but did not obtain the bill : whereupon the plaintiff immediately brought this action.

His lordship left it to the jury to say whether, when the demand was made, the defendant meant to dispute the plaintiff's right to the bill, or whether he really meant to send it to him when he could obtain it ; at the same time intimating a pretty strong opinion that there was no conversion.

A verdict having been found for the defendant,

Humfrey now moved for a new trial on the ground of misdirection, and that the verdict was against *evidence. The plaintiff was unquestionably entitled to the possession of the bill, and the defendant's [*609 neglect to restore it amounted to a conversion. [CRESSWELL, J. Did the defendant convert the bill, by putting it into the hands of his attorney?] Certainly not : he had at that time dominion over it, and a right to sue upon it. [CRESSWELL, J. Then, was he guilty of a conversion, by not immediately taking it out of his attorney's hands when his claim was satisfied?] Having fixed his own time for the re-delivery of the bill, his neglect to do so was evidence of a conversion. The question which ought to have been left to the jury, is, whether the defendant prevented or delayed the plaintiff in obtaining possession of his property, without any justifiable excuse. [WILDE, C. J. Can that be said to amount to a conversion by the defendant, which is neither an assertion of title in himself, nor a denial of the title of the plaintiff, nor evidences an intention on the defendant's part to withhold the chattel from him?] In *M'Combie v. Davies*, 6 East, 538, it was held, that, taking the property of another by assignment from one who had no authority to dispose of it ; as, taking an assignment of tobacco in the King's warehouse, by way of pledge, from a broker who had purchased it there in his own name for his principal, *and refusing to deliver it to the principal, after notice and demand by him*,—none other than the person in whose name it is warehoused being able to take it out,—is a conversion. [WILDE, C. J. That was, in effect, a denial of title.] In *Catterall v. Kenyon*, 6 Jurist, 507. goods of the plaintiff had been taken in execution upon process against the goods of B., and placed upon the premises of the defendant, who was an inn-keeper ; upon a demand of them by the plaintiff, *in the absence of the defendant, the wife of the defendant said that she [*610

would consult the attorney who had issued the execution, and, after having done so, refused, saying that she was not to deliver them up, and that he would save her harmless: and it was held that this was sufficient evidence of conversion. Lord DENMAN there said: "The case of *Verrall v. Robinson*, 2 C. M. & R. 495,(a) induced us to grant the rule; but I think that case does not apply: in that case, Lord ABINGER, and ALDERSON, B., considered that the chaise was in the custody of the law, and that the party with whom it was placed at livery was not at liberty to deliver it up after it had been attached by process out of the sheriff's court; after the attachment, the holder was passive, and no more than, as it were, an officer of the court, and was not justified in parting with it. Here, the goods of one party are by mistake taken by virtue of process against another, and, being placed on the premises of the defendant, the wife takes upon herself to inquire into the ownership of them, and, after inquiry, refuses to give them up. *I think that the party's so depriving the owner of the possession of his goods, is sufficient evidence of a conversion.*"

At all events, the plaintiff is entitled to a verdict on the issue upon not possessed.

*611] WILDE, C. J. As to the issue last adverted to, *the plaintiff is of course entitled to a verdict on that. Indeed, the whole strength of the defendant's case, upon not guilty, depends upon the plaintiff's right to a verdict upon not possessed. The verdict may be so entered from my notes.

As to the rest, the case appears to me to be quite free from difficulty. No doubt, the conduct of the defendant was evidence whence the jury might infer whether or not he had been guilty of a conversion. But here there was no evidence that the defendant had any intention to deny the plaintiff's title to the bill, or to withhold the possession of it from him: nor was there any such unreasonable delay on the defendant's part as would warrant the jury in inferring a conversion; on the contrary, the whole conduct of the defendant was consistent only with a *bona fide* intention on his part to deliver up the bill as soon as he could conveniently obtain it. Authorities are not wanting, to show that a party is not guilty of a conversion because he does not at once restore the chattel, where it is not at the moment in his possession and under his own immediate control.(b) It seems to me that the evidence was properly submitted to the jury, and that their conclusion was the correct one.

(a) In an action of trover for a chaise, it appeared that one B. had hired the chaise in question from the plaintiff, and had placed it at livery with the defendant, and that, whilst it was in the defendant's possession, in the city of London, it was attached by process out of the sheriff's court: the plaintiff demanded the chaise, but the defendant, alleging that it had been attached, refused to deliver it: it was held that there was no evidence of a conversion by the defendant, the chaise being, at the time of the demand, in the custody of the law, and not of the defendant.

(b) See *Canot v. Hughes*, 2 Scott, 663. There, certain wine warrants coming to the possession of the defendant as the personal representative of her deceased husband, who died insolvent, she

COLTMAN, J. The authorities cited by Mr. *Humfrey* seem to me conclusively to dispose of his argument. Here, there was a full and complete admission of the *plaintiff's title to the bill, and a promise to deliver it to him. There was nothing more than evidence [*612 from which the jury might, if they pleased, have found a conversion, if they had been satisfied that there had been wilful and unreasonable delay on the defendant's part in complying with the plaintiff's demand. I think the matter was properly left to the jury, and properly disposed of by them.

CRESSWELL, J. I am entirely of the same opinion.

V. WILLIAMS, J. I also think there is no ground for finding fault with the summing up in this case, or with the conclusion the jury came to. Rule refused.

placed them in the hands of her attorney: the warrants being demanded on behalf of the assignees of the husband, the defendant referred the applicant to the attorney: and it was held that this was not evidence of a conversion.

BARBER v. THOMAS. May 1.

To induce the court to set aside a warrant of attorney given to secure an annuity, on the ground of an improper returning or retaining of part of the consideration-money, the fact of such returning or retaining must be distinctly and unequivocally sworn to.

At the time of executing an annuity deed, the grantor, an attorney, received the full amount of the consideration-money, 170*l.*, and immediately paid thereout 8*l.* 8*s.* 6*d.* for the costs of preparing the securities and enrolling the memorial, and 20*l.* to the grantee's agent, in satisfaction of a liability to him (the agent) upon a bill of exchange drawn by the grantor upon and accepted by his father, and which was within a week of maturity:—

Held, that this was not such a transaction as would warrant the court in setting aside the securities eleven years after the date of the grant.

On the 3d of October, 1828, an annuity of 81*l.* 13*s.* was granted by Thomas Thomas, an attorney, for his life, to Elizabeth Barber, in consideration of the *sum of 170*l.*; Alfred Thomas the elder joining [*613 as surety. The annuity was further secured by a warrant of attorney of the same date, whereby Alfred Thomas the elder and Thomas Thomas authorized certain attorneys of this court to appear for them, and to confess the action and suffer judgment to pass against them, or either of them, for 340*l.*, in case default should be made in payment of the annuity, or any half-yearly payment thereof.

In the memorial enrolled in chancery, the witnesses to the execution of the deed were described as "P. Tait and E. Morris, clerks to W. Waller, of, &c.," the name of the person by whom the annuity or rent-charge was to be beneficially received, was stated to be "Elizabeth Barber," and, under the head "consideration, and how paid," the entry was, "one hundred and seventy pounds, paid in Bank of England notes."

Default having been made in payment of the annuity, and Alfred Thomas, the surety, being dead, judgment was entered up on the warrant

of attorney against Thomas Thomas on the 2d of October, 1848, and execution was issued thereon on the 13th of April, 1849, under which his goods were seized, to satisfy 274*l.* 5*s.* 6*d.*, for eight and a half years' arrears of the annuity, and 5*l.* 5*s.* for costs.

Upon an affidavit of the grantor, setting forth the above facts, and suggesting that P. Tait (now an attorney), and not Elizabeth Barber was, in reality, the person beneficially interested in the annuity, and further stating that the draft annuity-deed and warrant of attorney were prepared by the deponent, and delivered to Tait, who acted as the agent of Mrs. Barber, who caused them to be engrossed and stamped; that, after the execution thereof (which took place at the office of one Waller, an attorney to whom Tait was at that time under articles), and after the departure of Alfred *Thomas and the attesting witnesses (except *614] Tait), Tait gave the deponent, as the purchase or consideration-money for the annuity, the sum of 141*l.* 13*s.* 6*d.*, and no more, "*inasmuch as the said P. Tait did retain and keep back, out of the said sum of 170*l.*, the said purchase-money, the following sums, that is to say, the sum of 20*l.* secured to the said P. Tait, by a bill of exchange drawn by the deponent upon, and accepted by, the said Alfred Thomas, and endorsed by the deponent to the said P. Tait, falling due and payable on the 10th of October, 1838,*" and the said P. Tait did also *retain* the further sum of 8*l.* 6*s.* 6*d.* for certain costs which the said P. Tait alleged were due to him in respect of such grant of annuity and warrant of attorney, and of the memorial to be registered thereof, but that, although it is declared by the said grant of annuity, that the deponent was to pay the costs of preparing the said grant of annuity and warrant of attorney, out of the purchase-money, yet, that such retention of 8*l.* 6*s.* 6*d.*, or any sum beyond the actual expenditure occasioned for stamps, parchment, and engrossing, was a colourable charge and fraudulent retention by the said P. Tait, inasmuch as no sum whatever was disbursed by Waller, or charged by him to the deponent in respect of the said deed of annuity and warrant of attorney and memorial, nor did Waller ask for, or receive, any sum of money whatever in respect thereof, nor did the deponent ever treat with Waller respecting the said annuity, nor was Waller the attorney or solicitor of Mrs. Barber, nor was he in any wise concerned in the negotiation thereof, or in the preparation of the said securities, save by his taking the drafts to a conveyancer to be settled, which he voluntarily performed (at the request of Tait) without fee or reward, nor was Tait an attorney or conveyancer, nor did he incur any further charge beyond *615] paying for the stamps and parchment and for *engrossing the deed and warrant of attorney, and for the said memorial; that no bill of costs or charges was delivered or offered to be delivered, shown, or exhibited by Tait or by any other person whatever to this deponent, showing how the said sum of 8*l.* 6*s.* 6*d.* was made up; and that the deponent had been informed by Waller, some time prior to his death, which

took place on or about the 1st of October, 1848, and believed, that Tait had never accounted with him (Waller) for or in respect of any sum for or by reason of the said grant of annuity and warrant of attorney and memorial, that, save as aforesaid, he (Waller) did not superintend or interfere with the same, and had never been concerned as attorney or agent for Mrs. Barber, and that the purchase-money for the annuity was in reality Tait's own money,—

Byles, Serjt., on a former day in this term, obtained a rule calling upon Mrs. Barber to show cause why the warrant of attorney, judgment, and execution, and all subsequent proceedings, should not be set aside, on the grounds “that the said warrant of attorney was given for securing the payment of a certain annuity, and that part of the consideration-money for such annuity was improperly retained; that the name or names of the person or persons by whom the said annuity is to be beneficially taken or received, is or are not set forth in the memorial of such annuity; that the name of the said Elizabeth Barber, the plaintiff, is colourably used and stated in the said memorial, as being the person by whom the said annuity is to be beneficially taken or received; and that the particulars of the said annuity are not properly set forth in the said memorial, pursuant to the statute 53 G. 3, c. 141, in respect of stating the consideration and how paid, and the name *or names of the person or persons by whom the annuity or rent-charge is to be beneficially received,” &c. [*616

Ogle now showed cause, upon the affidavit of Mrs. Barber, who swore that the consideration-money paid for the purchase of the annuity was her own proper money, that she was and still is beneficially entitled to the annuity, and that Waller acted as her attorney in preparing the necessary documents for securing the annuity to her; and also upon an affidavit of Tait, who stated that he, at the solicitation of Thomas Thomas and Alfred Thomas (who was the father of Thomas Thomas, and one of the principal clerks at the treasury), procured Mrs. Barber to advance the former the sum of 170*l.*, by way of annuity; that the draft of the annuity deed was made by Thomas Thomas, and endorsed in his own handwriting with the name of Waller, as the grantee's attorney; that the grantor and Alfred Thomas, as surety, attended on the 3d of October, 1838, at the office of Waller, to execute the annuity deed and warrant of attorney; that the deponent thereupon immediately paid over to the grantor the sum of 170*l.*, in five notes of the governor and company of the Bank of England, namely, one note for 100*l.*, one for 40*l.*, and three for 10*l.* each; that, by the terms of the annuity deed, it was agreed that the grantee should pay the costs thereof, and of registering the memorial thereof, and of the warrant of attorney; that, after the said sum of 170*l.* had been so paid as aforesaid, the grantor paid to Waller, who then acted, as he had repeatedly done before and since, as the solicitor of the grantee, the sum of 8*l.* 6*s.* 6*d.* for the costs to which

he, Waller, was entitled, the account of which was as follows: "Instructions, 6s. 8d., drawing, 19s., engrossing, 9s. 6d., stamp and parchment, 2l. 10s., warrant of attorney, *6s. 8d., attesting execution, 13s. *617] 4d., attending, &c., 6s. 8d., memorial, 1l. 1s., coach-hire, 7s.," making together 8l. 6s. 6d., the receipt of which sum was entered in Waller's day-book and cash-book; that the deponent was, at the time of the grant of the annuity, the holder of a bill of exchange for 20l., for money which Thomas Thomas had previously borrowed of him, and which bill was drawn by Thomas Thomas upon, and accepted by, Alfred Thomas, and was then either due or on the point of becoming due, and that the said Thomas Thomas then paid him the amount thereof; that the said sum of 170l., so paid by the deponent to Thomas Thomas, was the proper moneys of Mrs. Barber, who always had been, and still continued, the person beneficially entitled to the said annuity; that neither Thomas Thomas nor Alfred Thomas, nor any other person or persons on his, their, or either of their behalf, had paid, in respect of the said annuity, or on account thereof, any other sum of money except the sum of 30l. 13s., which sum had been duly accounted for by the deponent to Mrs. Barber.

The suggestion that the name of Mrs. Barber was colourably used, is clearly answered. [To this *Byles*, Serjt., assented.] The only question then is, whether or not any part of the consideration-money was retained by the grantee or by her agent. As to the 8l. 6s. 6d., the affidavit of Thomas, the grantor, is distinctly answered. And, with respect to the 20l., what was more natural than that the person for whose accommodation the bill had been accepted, should, in order to relieve his father from responsibility, when he had got possession of a large sum of money, appropriate a portion of it to the discharge of a bill that was within seven days of maturity? The case is entirely free from any of those circumstances of suspicion which have, on various occasions, induced the *618] courts to interfere to relieve *parties from improvident bargains into which they had suffered themselves to be inveigled.

Byles, Serjt., in support of the rule. It appears from the affidavits, that part of the consideration-money was retained by Tait, who acted as the grantee's agent. This, it has repeatedly been held, is ground for setting aside the annuity. The 6th section of the 53 G. 3, c. 141. expressly provides, that, if any part of the consideration shall be returned to the person advancing the same, or retained, the court may order the deeds to be cancelled. And this has been done upon several occasions. In *Williamson v. Goold*, 1 Bingh. 234, 8 J. B. Moore, 109, where, upon the grant of an annuity, the agent of the grantee, on paying the consideration-money, retained, or caused to be returned to him, a considerable sum for the expense of deeds, investigating title, journeys, &c. (two witnesses, brought from a considerable distance for the purpose of attesting the annuity deed, having first retired), the court held this

an illegal retainer, for which the grantee was responsible, and on that ground set aside the annuity ten years after it had been granted and acted on, though the grantee alleged that he had given no authority for, and was ignorant of, such retainer. "We must," says DALLAS, C. J., "reduce the matter to the plain test and standard of common sense: when a man who negotiates, and profits by negotiating, an annuity, goes to a distance with two witnesses prepared for the purpose, who just see the signature of the grantor, and immediately retire, and then a large sum out of the consideration-money is taken back for the expense of deeds and journeys, is this such a payment as the statute requires? I think not: and we need not wander into the details of *the affidavits for other circumstances to impeach the fairness of the transaction." And BURROUGH, J., said: "Parliament has [619 imposed upon us the duty of watching these proceedings most narrowly. If the principal will not look to his own business in an affair of such importance, he must suffer for his neglect: the agent stands in his place, and the principal must be responsible for the due payment of the consideration-money. The act says the money must be *bond fide* paid: was this so here? The witnesses retire, and Gibbs and Goold are left together; Goold says that 450*l.* was retained, and Gibbs admits 350*l.*; which, he says, was for the expense of deeds and investigating title; but no bill of costs is produced, nor anything to justify the charge. The impression on my mind is, that this money has been improperly retained; and the annuity must, therefore, be set aside." So, in *Gorton v. Champneys*, 1 Bingh. 287; 8 J. B. Moore, 302, *per nom.* *Coventry v. Champneys*, a person employed by the grantor of an annuity to raise money, and by the grantee to pay the consideration-money to the grantor, having at the time of the payment of the money received back some part of it for a debt alleged to be due from the grantor to himself (which is precisely this case), the court, on motion, set aside the annuity on the grantor's paying principal and interest at 5 *per cent.*, though the grantee never received any of the money so returned, and was ignorant of that part of the transaction. "It is true, indeed," says PARK, J., in giving the judgment of the court, "that Gibbs swears that the whole of the consideration-money was really and *bond fide* paid into the proper hands of Sir Thomas Champneys, and the witnesses to the deed swear they saw the money paid, and none was returned in their presence. But, *can the court possibly wink so hard as not to see that all this is the machinery of these transactions? Witnesses to the deed are [620 necessary, and to the receipt of the money: but, as soon as they see the money laid down, and the deeds are executed, they leave the room. But, why did they not stay? Why did they not wait and see Sir Thomas Champneys put it in his pocket and go away with it? Because there was a great after-reckoning to take place, at which no human beings but Gibbs and Sir Thomas Champneys were to be present; when a secret

transaction was to be arranged, which would not admit of any witness but the parties. Is it pretended that a moment's interval elapsed between the execution of the deeds and the payment or return of the money to Gibbs? The affidavit most guardedly swears, that, *after* he had so paid the money (into the proper hands of Sir Thomas Champneys), that is, immediately, the account was settled, and 5427*l.* were paid by Sir Thomas Champneys to this deponent. This, therefore, puts an end to all those supposed cases stated at the bar, of the defendant having gone off with the money, and settled at *another time*; and to which the general answer is, the court look to the circumstances of each particular case, as proved before them; and would ill discharge their duty, if, on the one side or other, they were to act on supposition, and not on proofs." These cases were recognised and acted upon in *Calton v. Porter*, 2 Bingh. 370, 9 J. B. Moore, 703. [MAULE, J. In all these cases, the transaction was clearly fraudulent. In *Williamson v. Gould* a large sum was retained for procuration-money and expenses. In *Gorton v. Champneys*, 5400*l.* out of 6200*l.* was, as PARK, J., observes, "on one *pretence* or other retained and kept back." So, in *Calton v. Porter*, the handing over the *621] money was merely colourable. Here, *however, the charge for costs is fair and reasonable; and the 20*l.* was a sum that was voluntarily paid by the grantor of the annuity, in discharge of a bill which he would have had to pay at all events in a week. WILDE, C. J. The grantor does not say that there was any previous stipulation for the return or the retainer of any part of the money: if there had been any such previous agreement, no doubt he would have stated it. He says, on the contrary, that he never got the money at all. MAULE, J. He does not say, *simpliciter*, that he received only 141*l.* 13*s.* 6*d.*: but he says "Tait gave him, as the purchase-money or consideration for the annuity, the sum of 141*l.* 13*s.* 6*d.* and no more, *inasmuch* as the said Tait did retain and keep back," &c.] The onus of showing the fairness of the transaction lies on the grantee. The result of the affidavits clearly shows that the transaction is fraught with suspicion.

WILDE, C. J. I am of opinion that no ground has been shown in this case to deprive the grantee of the benefit of any of the securities for this annuity which she stipulated to receive. The grantor has failed to bring himself within any of the authorities; nor has he succeeded in showing that there was any unfairness in the transaction. It must be borne in mind that the grantor is himself an attorney,—a person well acquainted with matters of this kind, perfectly cognisant of his own rights, as well as of those of the parties he is dealing with, and not likely to be imposed upon. What are the facts? In consideration of an advance of 170*l.*, Thomas contracts to pay Mrs. Barber an annuity of 31*l.* 13*s.*; he paying the costs incident to the preparing the necessary securities, as is usual in such cases. Nothing is said in the affidavit as to any agreement by the grantor to pay, or that the grantee's agent

should *retain, any other sum ; and, if there had been any such previous agreement, the grantor must have known the importance of stating it. The parties,—that is, Thomas, the grantor, and Tait, the agent of the grantee,—meet at the office of Waller, to whom Tait is under articles, and whose name appears as that of the attorney acting in the business. Thomas, in his affidavit, states that 141*l.* 13*s.* 6*d.* only was paid to him : but he does not so state it as the grantee, whose securities are sought to be impeached, is entitled to have it stated ; the allegation is followed by words which make it equivocal—“*inasmuch as* the said P. Tait did retain and keep back out of the said sum of 170*l.*, the said purchase-money, the following sums, that is to say, the sum of 20*l.* secured to the said P. Tait by a bill of exchange drawn by the deponent (the grantor) upon and accepted by the said Alfred Thomas (who was the grantor’s father, and who was surety for the due payment of the annuity), and endorsed by the deponent to the said P. Tait, falling due and payable on the 10th of October, 1838” (just seven days later), and the 8*l.* 6*s.* 6*d.* for costs. How is that statement met ? By a positive affidavit by Tait, that he paid over to the grantor the full sum of 170*l.*, in five Bank of England notes, the amounts of which he specifies ; and he goes on to state, that, after the 170*l.* had been so paid, the grantor paid to Waller the 8*l.* 6*s.* 6*d.* for the costs, and to him the deponent 20*l.*, the amount of a bill of exchange, then about to become due, which had been given to him by the grantor for money previously lent by him to the grantor. If he were put in peril of perjury for his statement, the grantor might very fairly argue that it was not inconsistent with the transaction deposed to by Tait. But it clearly is not a proper mode of stating a case, when *coming to the court to set aside securities on the ground of fraud. I cannot help thinking that the affidavit was thus cautiously word-

ed, in order to prevent its being treated as a positive and distinct assertion that the grantor received 141*l.* 13*s.* 6*d.* only of the purchase-money. The impression conveyed to my mind by the two affidavits, is, that the whole 170*l.* was paid over to Thomas, and that he then paid to Waller, or to Tait on Waller’s behalf, 8*l.* 6*s.* 6*d.* for the costs, and 20*l.* to Tait in satisfaction of the bill held by him. And I see nothing unfair in that transaction. With respect to the 8*l.* 6*s.* 6*d.*, it consists of fair professional charges, paid by an attorney, who was perfectly competent to judge of their propriety at the time, and which are not now impugned as being excessive. But it is said that these costs were not in reality paid to Waller, but to Tait, who was not then in a situation to be entitled to make such charges. As to this, the case rests upon the affidavits upon the one side and upon the other. Tait swears positively that this money was received by Waller, and was duly entered in his day-book and cash-book. It is to be observed, that this transaction took place eleven years ago ; and that Waller was alive until last October. Have not the courts repeatedly said, that, if parties will forbear to come for redress, until

those who could have explained the transaction are removed by the hand of death, they will act with extreme caution and wariness in these cases? I think every intendment ought to be made, so far as Waller's name is concerned, which is not inconsistent with what is positively sworn to on the one side, and uncontradicted by any distinct statement on the other. Then, as to the 20*l.*, was that an improper retainer or return of part of the consideration-money? By no means. That sum, it appears, was *624] due for money previously *lent by Tait to Thomas, upon the security of a bill, accepted by the father of the latter, and which was within seven days of arriving at maturity. This was a debt which Thomas had a strong interest in discharging, seeing that his father,—a gentleman holding a responsible situation in a government office,—was security for its due payment. Under these circumstances, it is by no means unlikely that the grantor would discharge this debt without any previous stipulation, when he had money in his hands. Upon the subject of such stipulation, he is entirely silent. He puts it upon a totally different ground. The court, in these cases, always looks at the general nature of the transaction, in order to see whether there has been any oppression exercised towards the grantor. Merely formally handing over the money is nothing, if a large portion of it is to be immediately taken back, as expenses of the investigation of title, or under any other pretence. Upon the whole, I am unable to discover anything in this case to assimilate it with those in which the court has interfered to set aside the securities on the grounds suggested, and therefore I think this rule must be discharged.

COLTMAN, J. This is an application to the discretion of the court: and we are no further bound to interfere than the justice of the particular case may seem to us to require. The simple facts of the present case are these:—The grantor, having stipulated to grant an annuity of 3*l.* 13*s.*, in consideration of a sum of 170*l.*, receives that sum, and then pays a small amount for expenses, and a debt which was really and properly due from him, and which he had a more than ordinary interest in paying. There is no pretence for saying that he was in any way oppressed or improperly dealt *with. It would be giving a most *625] unjust operation to the statute, to set aside the securities taken under such circumstances.

MAULE, J. I entirely agree with the lord chief justice and my brother COLTMAN in thinking that this case is not brought either within the words or within the spirit of the act.

CRESSWELL, J., concurred.

Rule discharged.

PRITCHETT v. SMART. April 24.

The Court refused to entertain an application by a defendant in an action on a bill of exchange, to compel the plaintiff, a stock-broker, to produce his book, kept pursuant to the 7 G. 2, c. 8, s. 9, in order to enable the defendant to plead that the bill, which was an accommodation bill, had been endorsed over to the plaintiff by the drawer, for differences in stock-jobbing transactions,—on the ground that the defendant had no direct interest in the book.

Semble, that it is to the broker's principals that he is bound to produce the book.

Semble, that the court will not compel a party to produce a document, the production of which might subject him to penalties.

ASSUMPSIT on a bill of exchange drawn by one Richard Williams upon, and accepted by, the defendant, and by Williams endorsed to the plaintiff, a sworn broker of the city of London. The bill was suggested to have been accepted for the accommodation of the drawer, and by him endorsed to the plaintiff for differences upon stock-jobbing transactions.

The defendant being called upon to plead, made an application to MAULE, J., at chambers, to require the plaintiff to produce his broker's book; but that learned judge refused to make any order, expressing an opinion that the defendant's remedy, if any, was in equity.

**Byles*, Serjt., now moved for a rule to show cause why the plaintiff should not forthwith produce to the defendant his (the [*626 plaintiff's) book called the broker's book, pursuant to the provisions of the 7 G. 2, c. 8, s. 9, which contained the entries of the contracts, agreements, and bargains relating to the public stocks, made between the plaintiff and Richard Williams, the drawer of the bill of exchange mentioned in the declaration, and the days of making such contracts or agreements, so far as related to the sum or sums of money claimed thereon by the plaintiff from the said Williams when he endorsed the said bill to the plaintiff, and why the plaintiff should not show to the defendant, &c., such parts of the said book or register as contained such entries, &c.

This application is grounded on the 7 G. 2, c. 8, s. 9,(a) which requires every broker to keep a book which he is to produce "when thereunto lawfully required." In the only case upon this statute, Rawlings *v. Hall, 1 C. & P. 11, although it was held at nisi prius that a [*627 broker who had been served with a *subpœna duces tecum* was not

(a) "That all and every broker or brokers, or other person or persons who shall negotiate or act as a broker, receiving brokerage, in the buying, selling, or otherwise disposing of any of the said public or joint stocks, or other public securities, shall respectively keep a book or register, which shall be called 'The Broker's Book,' in which said book he and they shall fairly, justly, and truly enter all contracts, agreements, and bargains that he or they shall from time to time make between any person or persons whatsoever, on the day of the making such contract or agreement, together with the names of the principal parties, as well buyers as sellers, and also the day of making such contract or agreement, to the intent and purpose that such broker or brokers, and other person or persons acting or negotiating as such as aforesaid, shall, from time to time, produce such book or register when thereunto lawfully required; and, in case such broker or brokers, or any other who shall negotiate or act as a broker as aforesaid in relation to any of the said matters, shall not keep such book or register, or shall wilfully omit to enter therein fairly, justly, and truly, any such contract, bargain, or agreement as aforesaid, he or they shall, for every such offence or omission, forfeit and pay the sum of 50*l*. to be recovered," &c.

bound to produce his book kept pursuant to this statute, a rule for a new trial was granted, the court in banc appearing to be of opinion that he would be compelled to produce it. That case seems to establish, that, in an action between third parties, a broker is obliged to produce his book. [WILDE, C. J. Is it quite clear that a broker is bound to produce a book in a court of law, and thereby subject himself to penalties?] Here, the broker is the plaintiff, and the defendant ought to be allowed to defend himself by having access to the plaintiff's book. It was suggested, on the application at chambers, that the defendant's remedy, if any, was in equity; but *Bullock v. Richardson*, 11 Ves. 373, shows that the court of chancery will not interfere under this section, on the ground that it will not entertain an application for a bill of discovery, an answer to which might subject the party to penalties. [WILDE, C. J. What is the practice in this court on which you rely in applying for the present rule? V. WILLIAMS, J. The nearest cases to the present are where corporations or lords of the manor have been compelled to produce deeds and court-rolls; but, in those cases, the applicants had an interest in the documents.] This may be considered as being in substance an application by the drawer of the bill, who was a customer of the stock-broker; for, if the latter recovers against the defendant, the defendant may recover over against the drawer, the bill being an accommodation bill. The defendant, therefore, cannot be considered as a stranger to the book. Moreover, as the statute does not say to whom the book is to be produced, it would seem that the intention was, to make it a public book.

*628] WILDE, C. J. In general, applications like the present are made to a supposed equitable jurisdiction of the court. This defendant, however, does not appeal to any such power in the court, but relies on the statute, which, he says, obliges the plaintiff to produce his broker's book, when required; and the defendant calls upon us to enforce its production. It is the opinion of the whole court that this application does not rest on any solid foundation. I know of only one class of cases in which the court interferes to compel a party to a suit to allow his adversary to inspect documents which the latter alleges are necessary to his defence; and that is where the applicant has an interest in the documents to be produced. My brother WILLIAMS has referred to cases where corporations or lords of manors are required to produce their books or court-rolls. So, where two parties sign a document, which is left in the possession of one of them, the other clearly has a right to its production, without having recourse to a court of equity. So, where a document is considered to be held by one party as a trustee for himself and another. But these applications are never granted, unless the person seeking to enforce the production has an interest in the document withheld. Here, the defendant, the acceptor of the bill, says, "I can impeach the consideration which the plaintiff gave for it, if you will only allow me to examine his book." And he asks for its production, whereby the plaintiff may

not only be compelled to give evidence against himself in the action, but may subject himself to penalties. He grounds his application on the 9th section of the 7 G. 2, c. 8, which requires a broker to keep a book of all contracts, agreements, and bargains made by him. The statute undoubtedly prohibits all bargains for stock, assuming the appearance of a sale, but being, in reality, in the nature of a wager, and the book is to be produced, but *to whom? I apprehend to the broker's [*629 principals. It is clearly not the intention of the act to compel a broker to give evidence against himself, and thereby subject himself to penalties. This is shown by the 2d and 4th sections of the act; for, while the former allows him to be proceeded against in equity, by a bill of discovery, the latter indemnifies him against the consequences of answering. Were we to enforce the production of the plaintiff's book, we should have no power to discharge him from the penalties he might thereby incur. The defendant has no interest in the book; and it appears to me that it would be contrary to the spirit of the act, were we to require its production. The application, therefore, cannot be granted.

COLTMAN, J. It seems to me that we must reject this application, upon the same grounds on which a court of equity would refuse to call upon the party to answer a bill of discovery. According to the argument of my brother *Byles*, the filing of a bill of discovery would be just as lawful an occasion for the production of the book, as the present application. With respect to the words of the statute,—that the broker shall produce his book “when thereunto lawfully required,”—*Rawlings v. Hall* seems to show, that, on a trial at law, the broker, having been served with a *subpœna duces tecum*, is compelled to produce it.

CRESSWELL, J. I am of the same opinion. The statute says, the broker is to produce his book when lawfully required; leaving it to the court to determine what is a lawful occasion. Here, the defendant is not a party to any of the transactions presumed to be entered in the book; neither is it held by the plaintiff as a trustee for him. The only ground suggested for the *application, is, that the book, when [*630 produced, might enable the defendant to frame a plea that would furnish a good defence to the action. Is it, therefore, a lawful occasion? I apprehend it is not. The case of *Bullock v. Richardson* shows that the court of chancery will not, under this section of the act, oblige a man to answer a bill of discovery, which might subject him to penalties.

V. WILLIAMS, J. It is difficult to say how the court acquired the equitable jurisdiction which they exercise in compelling the production of documents. According to a case in 1 Wms. Saund. p. 98, 9th ed. n. (i), this jurisdiction is as old as the time of Charles II. It is clear, however, that we ought not to interfere in a case, in which a court of equity would decline to entertain a bill of discovery. Rule refused.

REED v. SHRUBSOLE. April 25.

Where, in an action of tort, the plaintiff obtains a verdict for less than 5*l.* under a writ of inquiry, he is entitled to his costs, although the sheriff has no power to certify, and although the action might have been brought in one of the new county-courts: *dissentiente*, CRESSWELL, J.

TRESPASS for an assault, the damages being laid at 100*l.*

The defendant having allowed judgment to go by default, a writ of inquiry was executed before the sheriff of Kent, under which the damages were assessed at 40*s.* The defendant thereupon entered a suggestion on *631] the roll to deprive the plaintiff of costs, under the *129th section of the county-courts act, 9 & 10 Vict. c. 95.(a) "for that the trespasses were committed at Sheerness, in the county of Kent, within the district of the county-court of Kent, held at Sheerness, and that a plaint might, at the time of the commencement of this suit, have been entered in the said court, &c.; and that neither the said sheriff nor any other judge hath ever certified that this action was fit to be brought in this court, &c.: wherefore he prays judgment if the plaintiff ought to recover any costs of suit in this behalf."

To this there was a demurrer and rejoinder.(b)

Creasy, in support of the demurrer. The question is, whether the section in the county-court act applies where there is judgment by default, and the damages are assessed under a writ of inquiry. It is *632] submitted that it does not; for, the act clearly contemplates those cases only in which the judge *can* grant a certificate. Where the damages under a writ of inquiry are assessed below 40*s.*, the sheriff has no power, by the 43 Eliz. c. 6, s. 2, to certify: *Wardroper v. Richardson*, 1 A. & E. 75, 3 N. & M. 839; S. P., *Claridge v. Smith*, 4 Dowl. P. C. 583. LITLEDALE, J., there says (1 A. & E. 76): "The words 'judges and justices,' in the statute of Elizabeth, cannot mean any but the judges and justices of the courts at Westminster." And PARKE, J., says (1 A. & E. 76): "It certainly was not intended, by the 3 & 4 W. 4, c. 42, s. 17, to give the power of certifying, to sheriffs and

(a) Which enacts, "that, if any action shall be commenced, after the passing of this act, in any of Her Majesty's superior courts of record, for any cause, other than those lastly hereinbefore specified (s. 128), for which a plaint might have been entered in any court holden under this act, and a verdict shall be found for the plaintiff for a sum less than 20*l.*, if the said action is founded on contract, or less than 5*l.*, if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and, if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless, in either case, the judge who shall try the cause, shall certify, on the back of the record, that the action was fit to be brought in such superior court."

(b) The following was the material point of demurrer stated by the plaintiff,—that the 129th section of 9 & 10 Vict. c. 95,—by which a plaintiff, upon a verdict found for him for a sum less than 5*l.* in an action of tort, shall recover such sum only and no costs,—does not apply to judgment by default and assessment of damages upon a writ of inquiry.

The defendant's point was, that the 129th section of the act applies as well to the case of a verdict upon a writ of inquiry, as to that of a verdict upon the trial of a cause, and also extend to deprive a plaintiff of costs where less than 5*l.* damages is recovered in an action founded on tort, whether the damages claimed in the declaration exceed 20*l.* or not.

other judges to whom causes were sent by writ of trial. There was once a clause in the bill to this effect; but it was struck out." So, such statutory restrictions do not extend to courts-baron: *Littlewood v. Smith*, 1 Ld. Raym. 181. That was a case upon the 21 Jac. 1, c. 16, which directs, that, in action for slanderous words, if the jury on the trial of the issue, or upon inquiry of damages, find or assess the damages under 40s., the plaintiff shall recover only so much costs as the damages given or assessed. That case is cited as showing the equitable construction which the courts are disposed to put upon these restraining statutes. When a plaintiff obtains a verdict for less than 40s., upon a writ of inquiry, in a case within the 22 & 23 Car. 2, c. 9, s. 136, he is entitled to full costs: *Sheldon v. Ludgate*, C. B. T. 3 G. 1, Bull. N. P. 329.(a) In *Bale v. Hodgetts*, 1 Bing. 182, 7 J. B. Moore, 602, PARK, J., says: "Can I suppose that the legislature did not understand the difference between a judgment by default and a judgment after verdict, or that this difference escaped their notice? If they meant that the defendant should pay costs in all cases where the plaintiff succeeds, **quod voluerunt non dixerunt*." So, the restriction in the old Middlesex county-court act (b) does not extend to verdicts after judgment by default: *Strutton v. Whitwell*, 1 Mann. & Ryl. 562. Lord TENTERDEN there says: "I think we ought to act upon the authority of the case of *Harris v. Lloyd*, 4 M. & S. 171, and grant no rule in this case. It was there decided by this court, that a suggestion cannot be entered under this act of parliament, in order to entitle the defendant to double costs, *after judgment by default, and writ of inquiry*; but only where there has been a trial. I am of opinion that that was a right decision; and I consider it much better to act upon it in the first instance, than, by granting a rule to show cause, to unsettle the question." In *Waller v. Deane*, 7 M. & G. 936, 8 Scott, N. R. 760, it was held that a proviso in a court of requests act, giving costs to the defendant, where the jury, *upon the trial of the cause*, found damages under 40s., does not apply to such a finding after judgment by default. In a case of *Dunster v. Day*, 8 East, 239, under the London court of requests act, (c) providing, that, if any action should be commenced out of that court, for any debt not exceeding 5*l.*, arising within the jurisdiction, the plaintiff should not, by reason of a verdict for him, *or otherwise*, be entitled to costs, &c.,—it was held, that, after judgment by default, and damages assessed upon a writ of inquiry, the defendant might move to stay proceedings, on payment of the damages assessed, without costs. But, in that case, as pointed out by Lord ELLENBOROUGH, the words "*or otherwise*" brought the plaintiff within the restriction., [CRESSWELL, J. Where the matter is confessed, no certificate is necessary. *V. WILLIAMS, J.* It has *been held, upon the statute of Charles, (d) that the word

(a) But writs of inquiry are now included: see 13 & 14 Vict. c. 24, s. 2.

(b) 23 G. 2, c. 33, s. 19.

(c) 39 & 40 G. 3, c. civ. s. 12.

(d) 22 & 23 Car. 2, c. 9, s. 136.

"actions" did not extend to other actions than actions of battery, by reason of the latter part of the section speaking of those actions only in which a battery can be certified: *Ven v. Phillips*, 1 Salk. 208. You say that, where the action is so disposed of as that there could not have been a certificate, the case is not within the statute.] That is what is contended for.

Wise, in support of the suggestion. In *Jones v. Barnes*, 2 M. & W. 313, S. C. *per nom.* *Jones v. Bond*, 5 Dowl. P. C. 455, it was held that the sheriff has no power to certify under the statute of Elizabeth,^(a) where the verdict upon a writ of trial is under 40s. But the power to grant a certificate has nothing to do with the question now before the court.

The cases cited on the other side turned upon the precise words of the particular acts of parliament, and have little or no bearing upon the present statute. In *Bishop v. Marsh*, 6 N. C. 12, 8 Scott, 128, and *Forbes v. Simmons*, 9 Dowl. P. C. 37, it was expressly held, upon the Middlesex court of requests act, that the 43 Eliz. c. 6, s. 2, did apply, although the sheriff had no power to certify. The right of the defendant to deprive the plaintiff of costs, arises, if the latter does not recover more than 40s. It is for the plaintiff to come to the court and say that the judge has certified in his favour. In *Nind v. Rhodes*, 17 Law. Journ. N. S., Q. B. 179, 5 D. & L. 621, one of the questions was, whether the defendant was bound to negative the fact that the judge had given a certificate. [V. WILLIAMS, J. There may be this difference between *Bishop v. Marsh*, and that class of cases, and the present. Suppose there were an action for a tort under 5*l.*, and that it was not *635] a fit action to try before the county-court. In such a case, according to your argument, it would always be in the power of a defendant to deprive the plaintiff of costs.] The court must look at the affirmative words in the statute, which is a general act, and one that ought to receive a liberal construction. To get rid of the effect of the previous words in the clause, the plaintiff should bring himself within the proviso, by producing a certificate; according to the rule of pleading, that, where a clause is in favour of the pleader, and there is a proviso against him, the latter should come from his opponent: *Simpson v. Ready*, 12 M. & W. 736, 1 D. & L. 1024; *Pilkington v. Cooke*, 16 M. & W. 615. [COLTMAN, J. That is merely a rule of pleading, and has no bearing on the construction of an act of parliament.] In *Barnard v. Moss*, 1 H. Bl. 107, a case of *Biddulph v. Cooper* is cited, which was an action for not setting out tithes under the 8 & 9 W. 3, c. 11, s. 3, which statute gives costs to the plaintiff in all actions of that description, "wherein the single value or damages found by the jury, shall not exceed the sum of 20 nobles."^(b) The plaintiff declared for less than 20 nobles, and signed judgment for want of a plea. On applying to

(a) 43 Eliz. c. 6, s. 2.

(b) 6*l.* 13*s.* 4*d.*

the prothonotaries to tax his costs, they consulted GOULD, J., who gave it as his opinion, that, as no trial or inquisition had been had by a jury, the plaintiff was not entitled to costs. In the present case, there *has* been an inquisition. In *Jefferies v. Beart*, 17 Law Journ. N. S. Q. B. 290, 12 Jurist, 1003, upon a writ of trial, in a case within the London small-debts act,^(a) it was contended, before WIGHTMAN, J., that the 113th section of that act (corresponding with the 129th section of the new county-courts act,^(b)) which deprives the plaintiff *of his right to costs in certain cases, contemplates trials before a judge who can [*636 certify. That learned judge said, that a judge of a superior court only could certify, but that the proper course would be, to make it a term in the order for a writ of trial, that the sheriff should have power to certify. [V. WILLIAMS, J. There may be a difference. Suppose the defendant does not dispute the debt, the case may nevertheless be one which ought to be brought in the superior court, though the damages are assessed at less than 5*l*. On an application for a writ of trial, the plaintiff may represent to the judge that he may lose his costs, and the writ of trial may be refused, unless the defendant will consent that the sheriff shall have power to certify.] The cases referred to on the other side, turned upon the construction of local acts: here, the court has to deal with a general statute. [WILDE, C. J. The legislature must be taken to have been apprised of the previous decisions, and would avoid the adoption of language which would defeat their purpose.] In *Simpson v. Ready*, 12 M. & W. 736, 1 D. & L. 1025, it was held, that, where a statute directed that certain actions should not be brought except by a burgess, it was not necessary to state in the declaration that the plaintiff was such burgess. [WILDE, C. J. That was a rule of pleading, as to the mode in which the matter was to be brought before the court; but here we have to decide upon the effect of the clause.] A party ought not to be allowed to obtain a benefit by false pleading: *Pilkington v. Cooke*, 16 M. & W. 615. There, although the bankrupt would be bound to defend the action, for the benefit of his creditors, he was held to be liable as for a vexatious defence. The statute of Charles^(c) contains an express affirmative enactment. [WILDE, C. J. Does not the *clause [*637 profess to deal with cases that shall be tried? and may not the plaintiff here be entitled to costs, there being no verdict within the meaning of the section? If it was intended to apply to a judgment by default, it is most inaptly drawn; but not so much so, if intended to apply only to cases where there had been a trial.] That may be so, if the proviso is to be considered as incorporated with the clause. The word "verdict," however, is ambiguous, and may mean a verdict of a jury upon issue joined, or a verdict after interlocutory judgment by default. If the construction contended for by the plaintiff be adopted,

(a) 10 & 11 Vict. c. lxxi.

(c) 22 & 23 Car. 2, c. 9.

(b) 9 & 10 Vict. c. 95.

a defendant who ought to have been sued in the county-court, will in no case suffer judgment by default, but will be driven to plead, and go to the trial, in order to deprive the plaintiff of costs, which he otherwise would have to pay.

Creasy, in reply. In *Taylor v. Rolf*, 5 Q. B. 337, 1 D. & Mer. 229, it was held that the words "issue or issues tried," in the 3 & 4 Vict. c. 24, s. 12, do not comprehend an inquiry after judgment on demurrer. Where there is no issue, there can be no trial. *Nind v. Rhodes* is inconsistent with *Bale v. Hodgetts*, 1 Bingh. 182, 7 J. B. Moore, 602. The cases of *Lewis v. Hance*, 17 Law Journ. N. S. Q. B. 172, and *Jones v. Brown*, 2 Exch. Rep. 329, show that the courts will not extend the words of the county-court act beyond their fair meaning. In *Bishop v. Marsh*, there had been a trial: here there was none.

WILDE, C. J. Though I have had some doubt, I have come to the conclusion that this case does not fall *within the statute, and *638] that a suggestion to deprive the plaintiff of his costs ought not to be entered. Two objections have been urged against the suggestion. The first is, that the case is not within the statute, by reason of its having been so dealt with that there was no power to give the certificate mentioned in the latter part of the section in question. The second is, that the case has not been tried, and, consequently, no such verdict has been found as was intended by the clause to be found, in order to deprive the plaintiff of his costs.

With respect to the first objection, it seems to me to be answered by the cases of *Bishop v. Marsh* and *Forbes v. Simmons*, where it was held that the operation of the Middlesex court of requests act was not excluded by reason of there being no power to grant the plaintiff's certificate for his costs.

As regards the other objection, I am of opinion that it is well founded; and that the clause does not contemplate a judgment by default, and an assessment of damages under 5*l.* upon a writ of inquiry. Looking at the whole clause, it appears to me clearly to exclude cases of judgment by default. The words are, "if a verdict shall be found for the plaintiff for a sum less than 5*l.*, if the action be founded on a tort, the said plaintiff shall have judgment to recover such sum only, and no costs." If the clause had stopped there, some difficulty would have existed in construing it. Whatever the rule of *pleading* may be—that the plaintiff should bring forward the proviso at the end of the section, by way of answer—the court, in construing it, are not relieved from the necessity of looking at the whole clause, in order to arrive at its meaning. The section then proceeds: "and, if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless, in either case, the judge who shall try the cause shall *639] certify," &c. The *words "if a verdict shall not be found for the plaintiff," cannot apply to a judgment by default, where the verdict *must* be found for the plaintiff,—a judgment that is interlocutory

only because the court is not informed as to the amount of the damages sustained. There is a great difficulty in supposing that the clause applies to a case where a verdict cannot be found for the plaintiff; and a still greater difficulty in coming to the conclusion that the absence of such a verdict should not only deprive him of costs, but render him liable to pay those of the defendant, as between attorney and client. These considerations seem to me strongly to show that the section contemplates the case only of a trial in which the plaintiff might not obtain a verdict; in which event alone the defendant is to be entitled to costs. There are many cases in which the court may assess the damages without the intervention of a jury. Most important cases may be decided *on demurrer*.^(a) Is it to be intended, that, in all these cases, the plaintiff shall be liable to pay costs? I feel the full force of the ingenious argument of the defendant's counsel, that this construction may induce defendants in trifling actions to plead and go to trial in order to get their costs. Such consequences may result; but I cannot believe that the legislature, in passing this clause, had in contemplation a judgment by default. I do not suppose that it intended expressly to exclude such a case; but, its attention being directed to other objects, judgments obtained without a trial were not considered. I am of opinion that the plaintiff is entitled to his costs, inasmuch as they are not taken away by this section.

*COLTMAN, J. Upon the best consideration which I can give to this case, it appears to me that the plaintiff is entitled to the judgment of the court. It is quite clear that he ought to have his costs under the statute of Gloucester, unless they are taken away by the 129th section of the county-courts act. I agree that this section may deprive a plaintiff of costs, though he may not have had the power of obtaining a certificate from the judge. But, although the power to grant a certificate may not be necessary in order to deprive a plaintiff of costs, the proviso is by no means to be left out in considering the clause; for, it reflects light upon the whole. Looking at the former part of the section, in connexion with the proviso, it appears to me that the clause applies only to cases where there has been a trial, and a verdict found by a jury. The effect would be serious, were another construction to prevail. There are many cases of great importance in point of law, in which defendants, by suffering judgment by default, might deprive plaintiffs of costs.

CRESSWELL, J. I certainly entertain great doubt as to the correctness of the view taken by the lord chief justice and my brother COLTMAN; and that doubt I am bound to express. In endeavouring to ascertain the true construction of the section, we must look at what we find in other parts of the statute. The first part of the section is not limited to cases where the judge has power to grant a certificate. Setting aside,

(a) The necessity for a further inquiry after judgment upon demurrer, will depend upon whether the decision is for the plaintiff or for the defendant, and, if for the plaintiff, whether a liquidated cause of action, as, in debt, or an unliquidated cause of action, as, in *assumpsit*, *trespass*, &c., has been confessed.

therefore, the latter part of the clause, let us look at the first part alone. The words are, "if a verdict shall be found for the plaintiff for less than 20*l.*, if the action is founded on contract, or less than 5*l.*, if it be founded on tort, the plaintiff shall have judgment for such sum only, and no costs." The word "verdict strictly means a verdict upon the trial of an issue; but, in common parlance, it is applied to the finding of a jury upon an inquisition of damages, and is so used in Lord DENMAN's act.(a) The last part of the section is,—“and, if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless the judge who shall try the cause, shall certify,” &c. That is supposed to limit the operation of the clause to cases in which verdicts have been found *on the trial of a cause* by a jury. I do not see why it should be so limited, or why it should not apply to cases where the court is in a situation to give damages without the intervention of a jury. It may mean, where the plaintiff *attempts* to get a verdict, and fails. It is said that it would be a great hardship, were the section to apply to judgments by default. It may be that difficulties would arise in certain cases; but it may be that the difficulty is the other way: and, as I cannot determine which way the balance of advantage, or disadvantage would be, it is perhaps better, in construing the clause, to lay such considerations aside, unless a manifest absurdity arises. I find, that, by the 58th section of the act, certain cases which are supposed to involve questions of law, or to concern the feelings of parties, are excluded from the jurisdiction of the county-courts; but that, with respect to all other cases, whatever the difficulties might be, the legislature intended the county-courts to have jurisdiction: and it seems to me that the intention equally was, that the plaintiff should not have his costs unless he recovered above a given amount. That is my present impression; but, if I am wrong, no injustice will be done to this plaintiff.

WILLIAMS, J. I am of opinion, with the lord chief justice and my brother COLTMAN, that the plaintiff is entitled to our judgment.
 *642] The question is, whether a verdict has been found for him for less than 5*l.*, within the meaning of the 129th section of the county-courts act. I think the clause does not apply to cases where there has been a judgment by default, or on demurrer. I agree with my brother CRESSWELL, that the legislature has excluded various cases from the jurisdiction of the county-courts; but, at the same time, it is equally clear that the statute contemplates a class of cases being brought in the superior courts, for which plaints might be commenced in the county-courts. If this were otherwise, the 129th section would not have contained a provision giving the judge power to certify so as to entitle the plaintiff to costs, notwithstanding he has not recovered more than a certain amount. If this be so, it seems absurd, that, in a case which is a fit case to be brought in the superior courts, the defendant, by suffering judgment by default, should

be enabled to deprive the plaintiff of costs. If the words of the section had been clear, we might be driven to such a conclusion; but, if they will admit of another construction, I think we ought to adopt that construction, so as to avoid such an absurdity. Suppose, in an action brought in a superior court on a bill of exchange, there is judgment by default, a rule to compute, and the damages are assessed at less than 5*l*. by the court,—if the larger construction contended for by the defendant were to prevail, the plaintiff not only would lose his costs, but would have to pay costs to the defendant, as between attorney and client.

Judgment for the plaintiff.

*WARD and others, Assignees of W. D. DAUNCEY, a Bankrupt, v. DALTON. April 25. [*643]

A. gave B. a warrant of attorney, under which judgment was entered up. On the 24th of August, 1840, a *fi. fa.* issued, under which the sheriff, on the 26th, seized A.'s goods, consisting of machinery, iron, &c. On the third of September, A. committed an act of bankruptcy. On the 8th and 9th of September, the sheriff sold part of the goods by auction, in lots, and received a deposit on each lot, but the lots were not separated from the mass. On the 11th of September, a *fiat* in bankruptcy was granted against A. On the 19th of September, and following days, the goods were weighed out and delivered to the purchasers. The sheriff subsequently paid over the whole of the proceeds of the sale to B. :—

Held, that the assignees of A. were entitled to recover the whole of the proceeds, including the deposits, inasmuch as there had been no perfect sale, but only an inchoate sale, at the time of the *fiat*, and B. still remained a creditor of A. having security, within the provisions of the 108th section of the 6 G. 4, c. 16.

In this action, the summons issued on the 21st of August, 1846. The declaration was for money had and received by the defendant to the use of the plaintiffs, as assignees under a *fiat* of bankruptcy issued against W. D. Dauncey. The bill of particulars stated, “The plaintiffs seek to recover the sum of 1294*l*. 14*s*. 6*d*., being the proceeds of a certain execution levied at the suit of the present defendant, upon the goods of W. D. Dauncey, in or about the month of August, 1840.” The defendant pleaded, first, non-assumpsit; secondly, a traverse of the plaintiffs’ being assignees of the estate and effects of the said W. D. Dauncey.

The cause was tried before WILDE, C. J., at the sittings in London after Hilary term, 1847, when a verdict was found for the plaintiffs for 1260*l*. 10*s*. and costs of suit, subject to the opinion of the court upon the following case :—

A *fiat* in bankruptcy issued against W. D. Dauncey, dated the 11th of September, 1840, and under that *fiat* he was duly found and adjudged bankrupt, and the *plaintiffs are the assignees of his estate and effects under that bankruptcy. The plaintiffs Ward and Solly [*644] were appointed assignees on the 3d of October, 1840, and the plaintiff Valpy, the official assignee, was appointed on the 30th of May, 1843. The bankruptcy of W. D. Dauncey was duly proved at the trial. On

the 20th of January, 1840, a writ of summons against the bankrupt, at the suit of the defendant, in an action on promises, was duly issued, and served upon the bankrupt on the 3d of February, 1840. On the 9th of March, 1840, the bankrupt executed a warrant of attorney to confess judgment at the suit of the defendant for 3500*l.*, in an action of debt. Judgment was signed upon this warrant on the 12th of March, 1840, and it was duly filed on the same day. Copies of all these documents are to be taken as part of the case.

On the 24th of August, 1840, a writ of *fi. fa.* was issued on the above-mentioned judgment, and lodged with the sheriff of Warwickshire, endorsed to levy 1787*l.* 3*s.*, and a warrant was issued thereon by the sheriff to his officer the same day. The officer seized the goods of the bankrupt on the 25th of August, and afterwards sold them (as hereinafter mentioned.) The present action is brought to recover the proceeds of those goods.

On the 3d of September, W. D. Dauncey committed an act of bankruptcy. On the 8th and 9th of September the goods (a quantity of machinery, iron, &c.) were sold by auction by the sheriff, in lots, at so much *per* ton or *per* cwt. The lots did not refer to specific parcels of iron, but the quantity described in each lot was weighed out to the respective purchasers from a large parcel. The auctioneer received deposits on the days of sale from the purchasers, to the amount of 93*l.* 13*s.* 1*d.* The goods were weighed out and delivered to the purchasers on the days and to the value as follows:—

				£	s.	d.
*645]	*September 19.	-	-	84	1	1
	21.	-	-	60	15	0
	23.	-	-	58	0	11
	26.	-	-	5	0	0
	29.	-	-	4	10	2
	30.	-	-	158	3	9
	October 5.	-	-	300	0	0
	25.	-	-	252	13	3
	Making, with the			93	13	1 for deposits,
	a total of			- 1,016	17	3

The *fiat* issued on the 11th of September, 1840.

On the 13th of October, 1840, the sheriff sold the residue of the goods so seized under the execution, which produced the sum of 650*l.*; and the net proceeds of the whole of the goods, after deducting rent, sheriff's poundage, officer's fees, &c., were paid over by the sheriff to the defendant's attorney in the cause of Dalton v. Dauncey, on the dates and in the sums following, viz.:

							£	s.	d.
1840.	November	17.	-	-	-	-	1,190	11	1
1841.	January	13.	-	-	-	-	104	3	5
1840.	September	12.	-	-	-	-	50	3	0
"	December	22.	-	-	-	-	15	16	7
							<hr/> £1,360 11 1 <hr/>		

The court is to adopt such inferences from the facts as it thinks the jury ought to have drawn.

The question for the opinion of the court is, whether the plaintiffs are entitled to recover any part of the amount paid to the defendant's attorney, as before-mentioned. And, if the court shall be of opinion that the plaintiffs are entitled to recover, the verdict is to stand, or to be reduced to the amount the court shall determine they are so entitled to recover. If the court shall be of opinion that the plaintiffs are not entitled to *recover any part of the said amount, a nonsuit to be entered. [*646]

The points on behalf of the plaintiffs were,—“first, that they are entitled to the whole amount of the proceeds of the several sales, on the ground that the execution mentioned in the case was defeated by the *fiat*;—secondly, that the execution was defeated by the act of bankruptcy;—lastly, that they are, at all events, entitled to the sum of 650*l.*, the proceeds of the sale on the 13th of October, 1840, on the ground that this sale was after the act of bankruptcy, and after the *fiat*.”

The defendant's points were—“first, that, as no notice of any act of bankruptcy was proved to have been had by the sheriff or execution-creditor before the execution, the plaintiffs cannot recover;—secondly, that, as the defendant had commenced an adverse action against the bankrupt previously to the giving the warrant of attorney, the plaintiffs have no right to recover;—thirdly, that the evidence, if it shall be deemed to support any claim, is in respect of a claim, not for money had and received for the use of the plaintiff Valpy jointly with the two other plaintiffs;—lastly, that, as to the sum of 710*l.* 11*s.* 1*d.*, the net proceeds of the sales anterior to the *fiat*, under the circumstances stated in the case, in no event can the plaintiffs recover.

M. D. Hill for the plaintiffs. The plaintiffs, at any rate, are clearly entitled to recover the proceeds of the sale on the 13th of October, 1840, which was upwards of a month after the issuing of the *fiat*. The bankrupt having confessed judgment on a warrant of attorney, the case falls within the express words of the proviso to the 108th section of the 6 G. 4, c. 16. [WILDE, C. J. The court are with you on this part of the case.] The other part of the plaintiffs' claim stands substantially on the same ground. It is submitted that there was not any sale of any part of the goods, so as to take *the property in them out of [*647]

the bankrupt, until after the *fiat*. Until the goods were weighed out and delivered to the purchasers, the property in them remained in the bankrupt. In *Rugg v. Minett*, 11 East, 210, it was decided, that, so long as anything remains to be done by the seller, the property in goods sold, does not pass to the buyer. Here, the goods, from the time of their being knocked down by the auctioneer, remained in one mass until weighed and delivered out. [CRESSWELL, J. The first lot was weighed and delivered out on the 19th of September. What portion of the whole belonged to the purchaser on the 18th?] It was decided, in *Giles v. Grover*, 9 Bing. 128, 2 M. & Scott, 197, that seizure of goods in execution, makes no change in the property. Lord TENTERDEN, in the course of his judgment, says (p. 280): "The judgment-creditor has no *property* in the goods while they remain in the hands of the sheriff." Here, the defendant continued to be a creditor of the bankrupt until long after the *fiat*.

Petersdorff (with whom was *Byles*, Serjt.), for the defendant. The question is, whether the facts stated bring this case within the 108th section of the 6 G. 4, c. 16. Although it is not distinctly found, it sufficiently appears, that the warrant of attorney was given in the action of *assumpsit*, which was adversely brought by the defendant against the bankrupt. If this be so, then the transaction is protected by the 1 W. 4, c. 7, s. 7. Suppose, in the action on promises, the declaration had been in debt, and no advantage had been taken of that irregularity, and judgment had been signed as in an action of debt, would not the court say that the judgment was in an adverse suit? [CRESSWELL, J. What was the judgment on which the execution issued?] It was in debt. [CRESSWELL, J. Then it had nothing to do with the action on promises. WILDE, C. J. It would be improper for us to hold the judgment on the *648] warrant of attorney to be a judgment in the action on promises.] With respect to the main question, supposing a distinction may be drawn between the sale on the 8th and 9th of September and that on the 13th of October, it is submitted, that, as regards the former sale, there was a binding contract before the issuing of the *fiat*; which is sufficient to take this case out of the 108th section of the 6 G. 4, c. 16. It is true that there was then no handing over to the purchasers of any specific portions of the goods: but the whole property in them was disposed of, and a deposit was paid. No authority can be found in which it has been held, that, to take the case out of that section, the sheriff must not only have sold the goods, but have received the whole of the purchase-money. [WILDE, C. J. It must be such a sale that the execution-creditor has ceased to be a creditor. If you can make out that the contract between the sheriff and the vendees of the goods had the effect of making the execution-creditor no longer a creditor, you will establish your point.] Supposing the sheriff to sell, and take a bond for the amount, the execution-creditor could no longer sue on the original

debt. [WILDE, C. J. Suppose the sheriff were to sell on credit, would that be any satisfaction of the debt?] The proper test is, when do the goods cease to be the property of the debtor? Do they not cease to be his property when the sheriff sells? [CRESSWELL, J. Supposing the bankrupt himself had sold the goods on the 8th and 9th of September, in portions which were not separated from the rest, would the property in them have passed to the vendees?] No. [CRESSWELL, J. Then, would it pass under the circumstances of the present case?] Here, the property is either in the sheriff or in the vendees. [CRESSWELL, J. If in the former, then the defendant is still a creditor having security: *Wymer v. Kemble*, 6 B. & C. 479, 9 D. & R. 511. WILDE, C. J. Could *the vendees of the goods have maintained trover for them?] No. [*649 [WILDE, C. J. Supposing they had been destroyed by fire, could the sheriff have brought an action for their price?] No. [WILDE, C. J. Then, what change of property is there in the goods?] A deposit was paid on the goods previously to the *fiat*. In what position does the defendant stand as to that deposit? With respect to the 93*l.* 13*s.* 1*d.* received for deposits, it is difficult to see how the plaintiffs have any claim. It is submitted, that, if the sheriff has so dealt with the goods as to become *responsible* for them, the execution-creditor ceased to be a creditor having security. Suppose the sheriff had taken securities for the purchase-money, would not the bankrupt have been discharged from the original debt? And if so, the defendant would no longer have been a creditor having security. This case is only a step short of that; for, the sheriff takes the promises of the vendees. [COLTMAN, J. But he has the goods in his possession at the time of the *fiat*, and the vendees are not entitled to them without paying the remainder of the price.] It was, however, paid afterwards, and part of it was received before as a deposit. There was part payment on every lot, and a contract with the vendees for the rest of the purchase-money. [WILDE, C. J. The auctioneer could not have been compelled to pay over the deposits; he received them as a stakeholder.]

WILDE, C. J. I am of opinion that the plaintiffs are entitled to the judgment of the court for the whole of the sum claimed. The case lies in a narrow compass. The construction put upon the 108th section of the 5 G. 4, c. 16, was adopted shortly after the passing of the statute, namely, that no creditor who has sued out execution on a judgment obtained by default, confession, or *nil dicit*, is protected, until he has ceased to be a creditor having security. If such a creditor *has [*650 received payment, and his debtor afterwards becomes bankrupt, the money cannot be recovered back. If he still continues to have security for his debt, he cannot enforce such security for his own exclusive advantage, but must share rateably with the other creditors. The question is, was the defendant, at the time of the *fiat*, a creditor having security? He had obtained a judgment, and had issued execution thereon,

and had seized the bankrupt's goods, which thereupon became a security to him for his debt. The seizure, however, had not the effect of extinguishing the debt. * He is, therefore, a creditor having security and the law says that he shall not avail himself of it, to the prejudice of the other creditors. It is contended, that, because the goods did not continue simply in the hands of the sheriff, but remained in them subject to certain contracts of sale, the case is altered. It seems to me that there are no grounds for that proposition; for, such contracts did not extinguish the defendant's debt, or operate so as to make him no longer a creditor having security. I can see no distinction as to the 93*l.* 13*s.* 1*d.* It is true that sum came into the hands of the auctioneer before the *fiat*: but it was paid for deposits in respect of unexecuted contracts of sale, and as a security for their fulfilment. It appears to me that it remained in the hands of the auctioneer, subject to the same legal rights as the goods themselves; and I can see no reason why the assignees are not entitled to it as well as the rest of the money.

COLTMAN, J. Although there was originally a difficulty with regard to the 108th section of the bankrupt act, it afterwards received a well-established construction. We must look at the state of things at the time of the *fiat*. The goods were at that time in the hands of the sheriff, *651] and the defendant was a creditor *of the bankrupt having security. If the goods had been before then sold and handed over to the vendees, the defendant would no longer have been a creditor having security. As to the other point, the auctioneer held the 93*l.* 13*s.* 1*d.*, not as a payment, but as a stakeholder; and the vendor would not have been entitled to it, if the sales had not been afterwards completed.

CRESSWELL, J. I am of the same opinion. There was no perfect sale of the goods previously to the *fiat*, but an inchoate sale only.

V. WILLIAMS, J., concurred.

Judgment for plaintiffs.

TEMPSON and Another v. KNOWLES. April 27.

B. and C., members of a railway committee, being indebted to A. in a large sum, which A. sought to recover by contributions from the committee, and A. having brought an action against B., and having threatened to sue C., D. promises that, in consideration that A. will cease to prosecute the action brought, and will forbear to sue C., he, D., will pay a certain smaller sum to A. In declaring upon this promise, it is not necessary to allege that D. was a member of the committee or that A. had any well-founded claim against the committee, or that the actions brought and threatened related to the committee, or that the plaintiff was ready and willing to accept the smaller sum in satisfaction of the debt owing from B. and C.

ASSUMPSIT. The declaration stated, that the defendant and his partner were solicitors to, and Charles Greatrex and Charles Shaw were members of, a committee of the Midland and South-Eastern Counties Junction Railway Company, and were indebted to the plaintiffs in a large sum of money, to wit, 1000*l.*, which the plaintiffs sought to recover from

*and by contributions thereto from members of the said committee, [*652 and for the recovery whereof the plaintiffs had brought an action against Greatrex in the Common Pleas, and had threatened, and then intended, to bring an action against Shaw; that thereupon, whilst the said action was so depending against Greatrex, the defendant, in consideration of the premises, and also in consideration that the plaintiffs would cease to prosecute, and would stay the proceedings in, the action against Greatrex, and would not take any proceedings against Shaw, promised the plaintiffs, that, unless the amount realized by the contributions of the committee should be sufficient to liquidate the said claim of the plaintiffs on or before the 1st of May then next, he the defendant would pay to the plaintiffs 30*l.* in discharge of all claims which the plaintiffs might have in connexion with the company, against Greatrex and Shaw,—averment, that the plaintiffs had ceased to prosecute the action against Greatrex, and had stayed proceedings therein, and that they had not taken any proceedings against Shaw; that the amount realized by such contributions was not sufficient to liquidate the said claims of the plaintiffs on or before the said first day of May, but that, on the contrary thereof, the sum so realized amounted to less than the said claim, to wit, to 500*l.*, and no more; and that the plaintiffs had not realized the said claim from such contributions, or from any of them,—notice, and request and refusal to pay the 30*l.*

General demurrer and joinder.

Phipson, in support of the demurrer. No breach of promise is shown. The declaration ought to show a claim of the same nature as the promise; but it is not stated that Greatrex and Shaw were indebted *as members of the company*, or that the debt had anything to *do [*653 with the company. The allegation is, that the defendant, jointly with his partner, was solicitor to, and Greatrex and Shaw were members of, the committee, and were indebted to the plaintiffs. Construed grammatically, this would import that all four were indebted. The words “in connexion with the company” relate to the connexion of the plaintiffs with the company; and the declaration ought to have disclosed some claim which the plaintiffs had against Greatrex and Shaw in connexion with the company. [V. WILLIAMS, J. The declaration seems to ascertain the effect the payment was to have. WILDE, C. J. Supposing the promise had been to pay 30*l.* in full of all demands, would it have been necessary to show that there were any demands? COLTMAN, J. The promise is, to pay 30*l.* in discharge of all and every claim which the plaintiffs *might* have, in connexion with the company, against Greatrex and Shaw; not at all affirming that there were any claims.] If the plaintiff had declared upon a promise to pay 30*l.* simply, there would have been a variance. The promise must be construed to mean, that the defendant will pay any claims which the plaintiffs can substantiate, not exceeding 30*l.* It does not appear that the plaintiffs were willing to accept the 30*l.* in satisfaction.

WILDE, C. J. As I read the declaration, the objections raised in the argument, on the part of the defendant, are not well founded. The declaration states, that the plaintiff had a claim against Greatrex and Shaw for 1000*l.*, and that, in consideration that he would cease to prosecute an action which he had commenced against Greatrex, and would forbear to sue Shaw, the defendant promised to pay the plaintiffs 30*l.* in discharge of their claims, in connexion with the railway company, against Greatrex and Shaw. It is said that there may have been no such claims.

*654] Perhaps there were none. The *defendant says, in effect, "I will pay you 30*l.*, provided you will take it in satisfaction of all claims you *may* have upon Greatrex and Shaw, in connexion with the company." Although there were no claim, the defendant might stipulate for the renunciation of the possibility of claim, engaging to pay 30*l.* absolutely. Such an arrangement might be very reasonable, because, although contribution only was sought, a liability might remain for a much larger sum than 30*l.*

COLTMAN, J. It seems to me that the declaration is quite sufficient. It begins by setting out a debt due from Greatrex and Shaw, but does not state that the debt is due in respect of the company. The defendant promises to pay 30*l.*, which is to operate in discharge of the debt.

CRESSWELL, J. I am of the same opinion.

V. WILLIAMS, J., concurred.

Judgment for the plaintiff.(a)

(a) See *Wilson v. Bevan*, post, p. 673.

WOODHAMS v. NEWMAN. *May* 1.

A defendant is not entitled to enter a suggestion to deprive a plaintiff of costs, under the 129th section of the county-courts act, 9 & 10 Vict. c. 95, where the debt or demand, originally exceeding 20*l.*, is reduced below that sum by a claim of set-off.

The words "on balance of account or otherwise," in s. 58, have reference to a debt reduced by payments, or a balance settled and ascertained before action brought.

THIS was an action of debt for work and labour and materials, goods sold and delivered, money paid, and money found due upon an account stated.

*655] *Pleas,—first, except as to so much of the causes of action in the declaration mentioned as related to the sum of 18*l.* 4*s.* 2*d.*, parcel of the moneys in the declaration mentioned, and the damages sustained by the plaintiff by reason of the non-payment thereof, *nunquam indebtedatus*; secondly, except as in the introductory part of the first plea was excepted, a set-off for work and labour, goods sold and delivered, money lent, money paid, money had and received, and money found due upon an account stated;—thirdly, as to the said sum of 18*l.* 4*s.* 2*d.*, parcel, &c., and the damages sustained by the plaintiff by reason of the non-pay-

ment thereof, payment of that sum and 1s. into court, and no damages *ultra*.

The plaintiff joined issue on the first plea, pleaded never indebted to the second, and took the money out of court in satisfaction *pro tanto*.

At the trial, at the first sitting in Middlesex in this term, the plaintiff proved that the defendant was indebted to him, in respect of the causes of action in the declaration, to the amount of 84*l.* 11*s.* 5*d.* beyond the sum paid into court. The defendant claimed to set off a demand amounting to 84*l.* 17*s.* 4½*d.*, which, with the exception of one item, was not disputed.

The jury having returned a verdict for 20*s.* only beyond the sum paid into court, and the judge having declined to certify, under the 129th section of the 9 & 10 Vict. c. 95, that the action was fit to be brought in the superior court,

R. Clarke, on a former day in this term, obtained a rule calling upon the plaintiff to show cause why he should not bring in the record, and the defendant be at liberty to enter a suggestion thereon to deprive the plaintiff of his costs, he having obtained a verdict for a less sum than 20*l.*, and the demand being one for the *recovery of which a [*656
plaint might have been entered in a county-court, pursuant to the statute 9 & 10 Vict. c. 95. The affidavit upon which the motion was founded, stated, that the plaintiff "is a plumber and glazier, and resides, and carries on business, at 47 High Street, Portland-Town, in the county of Middlesex;" that the action was commenced on the 8th of February, 1849; that, at the trial, the plaintiff proved a demand exceeding 20*l.*, and the defendant proved a set-off to such an amount as reduced the plaintiff's demand to a less sum than 20*l.*, including the moneys paid into court, and that thereupon the jury gave a verdict for the plaintiff for 20*s.*, and no more; that, before and at the time of the commencement of the action, the deponent (the defendant) dwelt and carried on his business at St. Paul's Road, Camden-Town, in the county of Middlesex, and that all the work mentioned in the plaintiff's particulars of demand, and alleged in the declaration to have been done, and the materials for the same provided, and in respect of which said work and materials the said verdict was, in part, so obtained as aforesaid, were so done and provided at Camden-Town aforesaid, and at St. John's Wood, in the said county of Middlesex; and that all the goods mentioned in the said particulars of demand were purchased by the deponent of and from the plaintiff at Portland-Town aforesaid, and delivered to the servants of the deponent at Portland-Town aforesaid, being the sale and delivery in the declaration mentioned, and in respect whereof the said verdict was in part obtained as aforesaid; that, at the time when this action was commenced, the plaintiff did not dwell more than twenty miles from the defendant, and did, and still does, dwell within twenty miles of the defendant; that the cause of action arose, in some material point, within

the jurisdiction of the county-court within which the defendant dwelt *657] and carried on *his business at the time this action was commenced; that the place where the defendant dwelt before and at the time when this action was commenced as aforesaid, and where he still dwells, and where the said work was done and the said materials provided and the said goods delivered as aforesaid, was, at the time when this action was commenced, and still is, within the jurisdiction of the county-court of Middlesex, and that such county-court was opened and established, and a plaint might have been entered in the said court for the sum recovered from this deponent by the plaintiff in this action, and due from the deponent to the plaintiff, before and at the time that this action was commenced, and the deponent then was liable to have been summoned in the said county-court for the sum recovered against him in this action. The affidavit then proceeded to negative that either of the parties was an officer of the county-court, and to negative that the judge had certified under s. 129, and concluded with an averment, that, with the exception of one item of 4s. alleged to have been paid by the plaintiff for the deponent, and which, if paid, was paid within the jurisdiction of the county-court of Middlesex aforesaid,—and in respect of which, to the best of the deponent's knowledge and belief, no evidence was given upon the trial of this cause,—the plaintiff's particular of demand in the action related only to the work done and the materials provided, and to the goods sold and delivered by the plaintiff to the deponent, which were thereinbefore mentioned.

Prentice now showed cause, upon an affidavit, stating, amongst other things, that no account had been stated by and between the plaintiff and defendant, or any balance ascertained to be due and owing from the defendant to the plaintiff, before the commencement of the suit. The *658] affidavit upon which this rule was *obtained, is insufficient; it does not allege,—as it ought to do, *Brooker v. Cooper*, 18 Law Journ. N. S., Exch. 41,—that, at the time of the commencement of the suit, the plaintiff and defendant were resident within twenty miles of each other.(a)

A case of reduction of the demand by set-off is not within the words, or the policy, of the statute 9 & 10 Vict. c. 95. The 58th section, which defines the jurisdiction of the county-court, enacts, “that all pleas of personal actions, where the debt or damage *claimed* is not more than 20l., whether on balance of account or otherwise, may be holden in the county-court, without writ; and all such actions brought in the said court shall be heard and determined in a summary way in a court constituted under this act, and according to the provisions of this act:” and then follows a proviso which is inapplicable to this case. The only other sections that have any bearing upon this question are, the 128th and the 129th. The 128th enacts, “that all actions and proceedings which

(a) The affidavit upon which cause was shown supplied this defect.

before the passing of this act might have been brought in any of Her Majesty's superior courts of record,—where the plaintiff dwells more than twenty miles from the defendant,—or where the cause of action did not arise wholly, or in some material point, within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought,—or, where any officer of the county-court shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof,—may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if this act had not been passed." And the 129th section enacts, "that, if any *action shall be commenced, after the passing of this act, in any [*659 of Her Majesty's superior courts of record, for any other cause than those lastly-hereinbefore specified, for which a plaint might have been entered in any court holden under this act, and a verdict shall be found for the plaintiff for a sum less than 20*l.* if the said action is founded on contract, or less than 5*l.* if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and, if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client; unless, in either case, the judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior court." Under the old courts of requests acts, the suggestion to deprive the plaintiff of costs, or to entitle the defendant to costs, was only allowed where the debt, originally above, was reduced below the limited amount by part payment, *Clark v. Askew*, 8 East, 28; (a) *Horn v. Hughes*, 8 East, 347; (b) *Fountain v. Young*, 1 Taunt. 60; (c) *Walker v. Watson*, 8 Bingh. 414, 1 M. & Scott, 674; (d) or by a plea of the statute of limitations, *Rothery v. Munnings*, 1 B. & Ad. 18, n; (e) infancy, *Bateman v. Smith*, 14 East, 301; (g) or the statute of limitations, *Stilwell v. Bracher*, 1 D. & L. 131; (h) the statutes did not apply to cases where the demand was reduced by a set-off, *Pitts v. Carpenter*, 2 Stra. 1191, 1 Wils. 19; (i) *Gross v. Fisher*, 3 Wils. 48; (k) *Cottle v. *Langman*, 9 J. B. Moore, 625; (l) [*660 *Jenkinson v. Morton*, 1 M. & W. 300, Tyrwh. & G. 696, 5 Dowl. P. C. 74; (m) *Bailey v. Chitty*, 2 M. & W. 28, 5 Dowl. P. C. 307. (n) In *Jones v. Harris*, 1 Dowl. P. C. 374, (o) TAUNTON, J., says: "The cases

(a) On the Southwark act, 22 G. 2, c. 47, s. 6.

(b) On the London act, 39 & 40 G. 3, c. civ. s. 12.

(c) On the Southwark act, 46 G. 3, c. lxxxvii. s. 12.

(d) On the Halifax act, 17 G. 3, c. xv. s. 30.

(e) On the London act, 39 & 40 G. 3, c. civ. s. 12.

(g) On the Middlesex act, 23 G. 2, c. 33, s. 19.

(h) On the Middlesex act, 23 G. 2, c. 33, s. 19.

(i) On the London act, 3 Jac. 1, c. 15.

(k) On the Middlesex act, 23 G. 2, c. 33, s. 19.

(l) On the Bath act, 45 G. 3, c. lxvii. s. 47.

(m) On the Middlesex act, 23 G. 2, c. 33, s. 19.

(n) On the Middlesex act, 23 G. 2, c. 33, s. 19.

(o) On the Middlesex act, 23 G. 2, c. 33, s. 19.

of *Bateman v. Smith* and *Chadwick v. Bunning*, 5 B. & C. 532, 8 D. & R. 155, (a) show, that, if the damages found by the jury for the plaintiff are reduced to less than 40s., in consequence of the original contract between the parties, or of part payments before action brought, the defendant is entitled to double costs under this act. But, if the plaintiff had an original demand against the defendant, exceeding 40s., and for which a verdict must have been found at common law, before the statute which gave the set-off, the case might be very different. It is not necessary now to give any opinion on that point; there are very good reasons why a case in which the plaintiff's demand is reduced by a set-off should be exempted from the operation of the statute. Those reasons may be found very pointedly and very strongly expressed in the case of *Pitt v. Carpenter*. The court there observed—"How could the plaintiff tell whether the defendant would set off anything in that action, so as to be bound to choose that jurisdiction? Besides, he has in effect recovered 4l. 15s. 3d.; because a debt which he must otherwise have paid, is now satisfied." So, in *Cottle v. Langman*, BEST, C. J., says: "It would be an act of injustice to the plaintiff, if this application were allowed to prevail; for, the defendant was indebted to him in the sum of 22l.; and, although he was aware that the latter had a counter-claim, yet he refused to give him an account of it; and it did not necessarily follow that the *661] defendant would plead a set-off, or *deliver particulars, so as to reduce the plaintiff's original demand below 10l. If he had sued the defendant under the local act, he could only have recovered to that amount; and the latter might then have commenced an action against him for the amount of his set-off." It being at the defendant's option to set off the cross demand or not, the plaintiff could not safely proceed for the balance only. [WILDE, C. J. The judge would have first to decide upon the amount of the plaintiff's demand, and then to inquire as to the defendant's set-off, and so balance the account. I think it is impossible that such a case can be within the act.]

The defendant's affidavit does not show within which of the eleven districts into which Middlesex is divided, the cause of action arose, or the parties resided at the time of the commencement of the action. (b) The "county-court of Middlesex" is, in s. 12, recognised as the court which is regulated by the 23 G. 2, c. 33.

At all events, the plaintiff would be entitled to the costs up to the time of paying money into court.

R. Clarke, in support of his rule. In *Fairbrass v. Pettit*, 12 M. & W. 453, 1 D. & L. 622, (c) PARKE, B., says: "The sum recovered by verdict, and not the amount claimed, is to be considered the debt for which the action is brought. That was so decided in *Shaddick v. Bennett*, 4

(a) On the Middlesex act, 23 G. 2, c. 33, s. 19.

(b) The affidavit seems to be bad in form, as misnaming the court, and in substance by reason of its giving imperfect information as to the district in which the cause of action arose and the parties resided. See *Hayter v. Fish*, 6 Man. Gr. & S. 568.

(c) On the Sandwich act, 47 G. 3, c. xxxv. s. 45.

B. & C. 769, 7 D. & R. 229,(a) which must govern the present case." The like was held in *Drews v. Coles*, 2 Tyrwh. 508, where the demand having been reduced by a set-off so as to bring it within the Bradford court of *requests acts,(b) the court ordered a suggestion to be entered, to deprive the plaintiff of costs. The cases of *Pitts v. Carpenter*, *Gross v. Fisher*, *Cottle v. Langman*, *Jenkinson v. Morton*, and *Bailey v. Chitty*,—turned upon the particular language of the several statutes. Whether the demand be reduced by payment, by tender, or by set-off, can make no difference. In *Laing v. Chatham*, 1 Campb. 252, it was ruled by Lord ELLENBOROUGH, that, where the defendant has a set-off against the plaintiff, of which he gives notice under the statute, but does not appear at the trial, to offer evidence of it, the plaintiff may either take a verdict for the whole sum he proves to be due to him, subject to be reduced to the sum really due on a balance of accounts, if the defendant will afterwards enter into a rule not to sue for the set-off; or he may take a verdict for the smaller sum, with a special endorsement on the *postea*, as a foundation for the court to order a stay of proceedings, if another action should be brought for the account of the set-off.(c) That case shows that there is no such difficulty as is suggested on the other side. [WILDE, J. What would be the plaintiff's position, in the case put, if the defendant brought his action in another court?(d) MAULE, J. How would the plaintiff have framed his plaint in the county-court, if he had wanted to try what was tried here?] The 58th section, which gives jurisdiction to the county-court where the debt or damage claimed is not more than 20*l.*, "whether on balance of account or otherwise," clearly embraces reduction by set-off. [MAULE, J. Surely it cannot mean balanced by set-off.]

WILDE, C. J. I am of opinion that this case does not fall within the 9 & 10 Vict. c. 95, and therefore that the defendant is not entitled to enter a suggestion upon *the record to deprive the plaintiff of costs. [*663 The application is founded upon the 129th section of the act, which enacts, that, "if any action shall be commenced, after the passing of this act, in any of Her Majesty's superior courts of record, for any cause other than those lastly hereinbefore specified,(e) for which a plaint might have been entered in any court holden under this act, and a verdict shall be found for the plaintiff for a less sum than 20*l.* if the said action is founded on contract, or less than 5*l.* if it be founded on tort, the said plaintiff shall have judgment to recover that sum only, and no costs."

(a) On the London act, 39 & 40 G. 3, c. civ. s. 12.

(b) 3 G. 3, c. xix., and 47 G. 3, sess. 2, c. xxxix.

(c) *Vide post*, p. 672.

(d) *Vide post*, 671.

(e) That is, where the plaintiff dwells more than twenty miles from the defendant; or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought; or where any officer of the county-court is a party,—except in respect of any claim for any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof: s. 128.

Before, therefore, a plaintiff can be deprived of costs under that section, the verdict must have been obtained in respect of a demand for which a plaintiff might have been levied in a county-court. In construing this act, our attention is not to be confined to the particular section; regard must be had to the general scope of its provisions. The 58th section is considered as bearing upon the question now before us, and as assisting the construction of s. 129: the one section limits the power of the superior courts, in certain cases, to the giving judgment for the debt, without costs; the other regulates and defines the jurisdiction conferred upon the county-court. It is said that this is a case in which a plaintiff might have been levied in the county-court, by force of the 58th section, which,—subject to a proviso not applicable here,—enacts that all pleas of personal *664] actions, where *the debt or damage claimed* is not *more than 20*l.*, whether on balance of account or otherwise, may be holden in the county-court without writ: for, that a debt or demand originally exceeding 20*l.*, but reduced by set-off below that sum, falls expressly within the words “claimed on balance of account or otherwise.” It seems clear to me that these words were meant to apply to accounts that have been adjusted and balanced by the parties, or reduced within the prescribed limits by payments. Still, whatever the meaning of the words, this is not a case wherein a plaintiff might have been levied in the county-court. The legislature evidently intended to confine the jurisdiction of these courts to small demands not requiring the intervention of a jury: otherwise, one cannot very well see the reason for limiting the amount recoverable at all. Very intricate and important questions might arise in a case of this sort. The right of the one party or the other to the verdict, might depend upon one entire item to the amount of 50*l.*, or any larger sum. In considering whether the construction we are invited to put upon the statute is or is not the true one, we must not shut our eyes to the inconveniences to which it might lead. What was the amount of the debt *claimed* in this case? The plaintiff’s demand exceeded 100*l.* The county-court must have determined, whether, and to what extent, that demand was established, before proceeding to consider to what extent it was reduced by the defendant’s set-off. Here, in the result, a balance a little below 20*l.*, in favour of the plaintiff, is arrived at, in ascertaining what was due to either party in respect of two several accounts each considerably exceeding that sum. How could the plaintiff in such a case levy a plaintiff in the county-court? He has no means of knowing that the defendant will avail himself of his right of set-off; nor could he, by giving the defendant credit for the amount he conceived to be due to him, *665] prevent the defendant *from taking the opinion of a superior court upon the subject of his counter-claim. The plaintiff, therefore, would have no certain means of coming to a conclusion as to the amount, or, in many cases, as to the nature, of the set-off. I do not perceive how a plaintiff, generally speaking, could, under such circumstances, levy a

plaint in the county-court. I therefore think the present case is neither within the words or the meaning of the act. It never could have been intended that these inferior tribunals should be engaged in the discussion of mutual claims to an unlimited amount, merely because the ultimate balance might, by means of a set-off, be reduced to less than 20*l*. For these reasons, it appears to me that the rule was moved upon a misconstruction of the act, and must be discharged.

COLTMAN, J. The cases decided upon the old courts of requests acts, seem to me to have a very considerable bearing upon this question. The principle they furnish, is, that these inferior courts, which were established for the recovery of debts and demands of small amount, are not to assume to themselves jurisdiction in a case which in point of fact involves the decision of two several actions of large amount. The words of the 58th section, which give the jurisdiction, give it in cases "where the debt or damage *claimed* is not more than 20*l*., whether on balance of account or otherwise." The cases undoubtedly show that the sum *claimed* is in general to be measured by the amount *recovered* by the verdict. But those were cases where the amount *really due* was shown, before the jury, to be less than the sum for which the plaintiff originally went, and not cases where the demand was reduced by a claim of set-off. They do not, therefore, apply to this case. I think this is a matter for which the plaintiff could not have levied a plaint in *the county-court*; and, if so, it is idle to contend that he was precluded [*666 from suing in the superior courts.

MAULE, J. I am of the same opinion. This is an application founded upon the 129th section of the county-court act, by which the defendant seeks to deprive the plaintiff of costs, on the ground that he commenced his action in a superior court, for a cause, other than those described in the 128th section, for which a plaint might have been entered in a county-court under the act. The simple question, therefore, is, whether the plaintiff's cause of action was one for which a plaint might have been entered in the county-court. I conceive, that, if the case had been one in which the plaintiff might have had the same measure of justice meted out to him by the county-court, as he could in the superior court, he ought to be deprived of the costs he has incurred in needlessly suing before the more expensive tribunal. To deprive a party of costs for suing in a superior court, when he could not proceed in the county-court with effect, would be a practical absurdity: it would be giving a forced construction to the language of the act, and making it an engine of oppression. The plaintiff in the present case clearly could not have obtained full justice in the county-court. If he stated his *whole* claim, it would show that he was not entitled to sue in the county-court. If he entered his plaint for 20*l*. or less, he must abandon the rest [*667 of his claim (a). The defendant could not be compelled *to

(a) Under s. 63, which enacts, "that it shall not be lawful for any plaintiff to divide any cause

bring forward his counter-claim in the county-court: or, he might set off his demand to the extent of 20*l.*, leaving the residue to be the subject of a future action in the superior or inferior court, as the case might be; in which action the plaintiff in the former action could not, by set-off or otherwise, avail himself of the abandoned portion of *his* claim. The 58th section enacts that all pleas of personal actions, where the debt or damage claimed is not more than 20*l.*, *whether on balance of account or otherwise*, may be holden in the county-court. This clearly is not a claim on balance of account. Those words, I conceive, mean this—Suppose a claim to be preferred in the county-court for a sum below 20*l.*, and it appears that the debt originally exceeded 20*l.*, but has been reduced by payment or otherwise before action brought, the defendant shall not be entitled to say that the case is without the jurisdiction of the county-court, because the debt originally exceeded 20*l.* The verdict is the criterion of the amount of the claim: but, in my opinion, the statute never was meant to apply to the case of a demand reduced by set-off.

CRESSWELL, J. I am entirely of the same opinion. The 129th section deprives the plaintiff of costs only where the action is brought in a superior court for a cause,—not within the exceptions,—for which a plaint might have been entered in a court holden under the 9 & 10 Vict. c. 95, and where the amount of the debt or demand for which a verdict has been recovered does not exceed 20*l.* The jurisdiction conferred upon the county-court by s. 58, is not to be ousted by alleging, and *668] failing to prove, a demand exceeding 20*l.* It cannot *be truly said that the sum claimed in this case was due upon any balance of accounts. There had been no balance ascertained and struck between the parties, in consequence of cross-claims, or payments on account, or otherwise. Limiting a claim to an amount recoverable in the county-court, and abandoning the excess, is a matter wholly independent of any question of set-off. It is always optional with the defendant to avail himself of his set-off or not: and by s. 76, the set-off is expressly excluded, without the consent of the plaintiff, unless the defendant shall have given to the clerk of the court such notice thereof as the rules made for the regulation of the practice of the court direct.(a) For these reasons,(b) I am of opinion that this case does not fall within the

of action, for the purpose of bringing two or more suits in any of the said courts, but any plaintiff having cause of action for more than 20*l.*, for which a plaint might be entered under this act, if not for more than 20*l.*, may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20*l.*; and the judgment of the court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly." See *Vines v. Arnold*, M. T. 1849, *post*, 8 *Man. Gr. & S.*

(a) Five clear days before the day of hearing. Rule 17.

(b) Nothing fell from the court as to the second objection, which appears to be also fatal. *Vide supra*, 661

129th section, and consequently that there is no ground for entering a suggestion to deprive the plaintiff of his costs. Rule discharged.(a)

(a) See the next case.

***BESWICK v. CAPPER. June 12.**

[*669

A demand exceeding 20*l.*, and reduced by *set-off* to a sum not exceeding 20*l.*, is not within the jurisdiction of the county-courts created by 9 & 10 Vict. c. 95.

IN June, 1847, Beswick brought an action against Capper in the court of Exchequer, in which he sought to recover 62*l.* 5*s.* 8*d.*, being the balance alleged by Beswick to be due to him from Capper in respect of a building-contract, after deducting a sum of 186*l.* 16*s.* 9*d.*, which Beswick admitted to be due from him to Capper, for cash to the amount of 70*l.* paid on account, and goods sold and delivered to the amount of 116*l.* 16*s.* 9*d.* To this action Capper pleaded, not guilty, and a *set-off* of 126*l.* 9*s.* 5*d.*, for goods sold and delivered, work and labour, and money paid by him on account of Beswick. At the trial before ROLFE, B., at the last summer assizes at Stafford, the contract not being produced, the plaintiff was nonsuited.

In April last, Capper commenced an action against Beswick, in the Exchequer, to recover 40*l.* 16*s.* 4*d.*, being the balance alleged by Capper to be due to him from Beswick, after giving credit for 175*l.*, the sum mentioned in the building contract.

On the 14th of May instant, Capper was served with a summons issuing out of the county-court of Staffordshire, at Hanley, at the suit of Beswick, whereby the latter sought to recover 20*l.* as and for "balance of account for goods sold and delivered, work and labour done, and materials supplied." Annexed to the summons were the following particulars of the plaintiff's demand:—

"In the county-court of Staffordshire, at Hanley, &c.

"This action is brought to recover the sum of 20*l.*, as due to the said plaintiff from the said defendant, *upon the balance of account [*670 in respect of the contract mentioned below, and for the extra work done and materials found and provided by the said plaintiff for the said defendant beyond the work specified or referred to in the said contract; the said plaintiff consenting to allow the *set-off* of the said defendant, and to abandon the excess which may be due to him beyond the sum of 20*l.*

£ s. d.
"15th May, 1846. Amount as per contract of this date 175 0 0

"Extras beyond contract [Here followed a great number of items, in the aggregate amounting to] - - - 52 2 8

"Creditor by cash and goods - - - - 227 2 8
186 16 9

"Balance - £40 5 11"

The parties appeared at the county-court, when it was objected, on the part of Capper, that the judge had no jurisdiction in the matter, inasmuch as it involved a set-off and cross-demands between him and Beswick, each exceeding 20*l.*; and he was referred to *Woodhams v. Newman*, ante, p. 654. The judge, notwithstanding, proceeded to hear and determine the case, and gave judgment for the plaintiff for the amount claimed; the defendant not having given any notice of set-off, or in any way assented to the judge's right to try the cause.

Upon affidavits setting out the above facts, and alleging that the above-mentioned sum of 40*l.* 5*s.* 11*d.* was not, nor was any part thereof, a balance of any account between Beswick and Capper, and that no accounts between them in respect of the matters mentioned in the particulars had ever been settled,

**T. Jones*, on a former day, obtained a rule calling upon Beswick to show cause why a writ of prohibition should not issue to the judge of the county-court of Staffordshire, at Hanley, to prohibit all further proceedings in the said court against Capper upon the judgment recovered against him upon the said plaint.

Greaves showed cause. The question is whether a debt reduced by set-off is not equally within the 9 & 10 Vict. c. 95, as one reduced by payment. [CRESSWELL, J. The plaintiff's claim here was 227*l.* 2*s.* 8*d.* How can the county-court have jurisdiction in such a case?] The plaintiff only claims 20*l.*: the rest is admitted to be satisfied, or abandoned. [CRESSWELL, J. No doubt, the plaintiff was at liberty to abandon all but 20*l.* That, however he does not do. He says, in effect, that he is willing to take the 186*l.* 16*s.* 9*d.*, which he admits that the defendant is entitled to claim from him, in satisfaction of so much of his demand, and to abandon 20*l.* 5*s.* 11*d.* WILDE, C. J. To entitle the plaintiff to recover the 20*l.*, he must prove a claim overtopping, by that sum, the defendant's admitted claim of 186*l.* 16*s.* 9*d.*] The same thing must be done in the case of a demand reduced by payment. [CRESSWELL, J. The case of payment is expressly provided for. But you cannot compel a defendant to avail himself of his right to set off a counter-claim. You would find a difficulty in meeting his action for the cross-demand.] *Laing v. Chatham*, 1 Campb. 252, cited ante, p. 662, shows the remedy for that. [CRESSWELL, J. Do you find that that case has ever been acted upon?] It must be admitted that there is no trace of the course there pointed out having ever been adopted.(a)

**Jones* was not required to support his rule.

*672] WILDE, C. J. It appears to me that this was not a case within the jurisdiction of the county-court. It is a mistake to say that the plain-

(a) Lord ELLENBOROUGH seems to have been of opinion that the effect of the endorsement on the notes would be, to place the parties nearly in the same position as if the defendant had pleaded his set-off to so much of the plaintiff's demand as corresponded with the amount of the set-off, and the plaintiff had confessed the plea and had established a demand *ultra*. If the defendant entered into the rule suggested, he would, of course, be liable to an attachment, if he sued for the set-off.

tiff abandoned all his claim beyond 20*l*. To establish his right to recover to that extent, he would be bound to prove a demand exceeding the amount of the defendant's set-off.(a) The matter in contest, therefore, was very much beyond what the legislature contemplated should be submitted to the inferior jurisdiction. The case of an adjusted account is altogether different.(b) The only assent to the set-off here, was, by the plaintiff's thinking fit to give credit for it in his particulars. The rule for a prohibition must be made absolute.

COLTMAN, J. I am of the same opinion. This point was, in effect, decided in *Woodhams v. Newman*, ante, p. 654. A demand reduced by set-off, is not within the statute.

CRESSWELL, J., concurred.

Rule absolute.

(a) The plaintiff, by his particulars, undertook so to do: but, *quare* how far he would be bound by that undertaking, if the defendant did not think fit to give notice of set-off. Another difficulty presents itself: if the plaintiff did not abandon the excess of his *cause of action*, beyond 20*l*., how was he entitled to sue in the county-court, under s. 63?

(b) 3 Man. Gr. & S. 212, n.

*WILSON and Others v. BEVAN. May 2. [*673

A declaration in *assumpsit*, stated that the plaintiffs had commenced an action against A. to recover a sum due to them from A., and another action against B., as a party liable in respect of the same debt; that, in consideration that the plaintiffs would consent to stay the proceedings in the action against A. until a given day, and would proceed to trial with the action against B. at a certain sitting, or as soon after as the practice of the court would admit of,—the defendant promised that he would indemnify the plaintiffs against all costs and expenses connected with the action against B., *whether the same should be decided in favour of the plaintiffs or of B.*, and that he, the defendant, would pay the *same* costs and expenses when requested by the plaintiffs. The declaration then averred that the plaintiffs, confiding in the promise of the defendant, did consent to stay, and did stay, the proceedings in the action against A., and that they duly proceeded to trial with the action against B., and obtained a verdict therein; that the verdict was afterwards set aside, and a new trial ordered, upon payment of costs by B.; that the plaintiffs again set down the cause for trial; that, by the direction and at the request of the defendant, the record was withdrawn; and that the plaintiffs had incurred, and paid, certain costs and expenses in connexion with the said action: and assigned for breach, the defendant's refusal to reimburse them:—

Held, that the declaration disclosed a good cause of action, the *final determination* of the action against B. not being a condition precedent to the plaintiffs' right to sue for the costs, and the consideration being satisfied by the plaintiffs' staying proceedings against A., and going to trial against B.

THIS was an action of *assumpsit* upon a contract of indemnity.

The first count of the declaration stated, that, before the making of the promise by the defendant as thereafter next mentioned, the plaintiffs had commenced and prosecuted, in the court of our lady the Queen before the barons of Her Exchequer at Westminster, a certain action at the suit of the now plaintiffs against one W. F. Black, G. Mackintosh, and F. I. van Zeller, for the recovery of a certain sum of money due and owing to the plaintiffs, to wit, the sum of 252*l*. 12*s*. 2*d*., for goods supplied by the now plaintiffs on the order of one Robert Moore, as for

the use of a certain company or undertaking called The Great Western
*674] and *Cornwall Junction Railway, and in which said debt or sum
of 252*l.* 12*s.* 2*d.* the said W. F. Black, G. Mackintosh, and F.
I. van Zeller, at the time of the commencement of the said action, were
justly and truly indebted to the now plaintiffs, and which said action at
the suit of the now plaintiffs against the said W. F. Black, G. Mackintosh,
and F. I. van Zeller, before and at the time of the making of the
said promise by the defendant, was pending in the said court, and was
being proceeded with by the plaintiffs, according to the practice of the
said court, for the recovery of the said debt or sum of money; that,
before the making of the said promise by the defendant as thereafter
next mentioned, the plaintiffs had also commenced and prosecuted in the
said court of our lady the Queen, before the barons of Her Exchequer
at Westminster, a certain other action, at the suit of the now plaintiffs,
against one H. F. Wollaston, as a member of the provisional com-
mittee of the said company, for the recovery of the said debt or sum of
252*l.* 12*s.* 2*d.*, and which said action against the said H. F. Wollaston,
before and at the time of the making of the said promise by the defend-
ant as thereafter next mentioned, was also then pending in the said
court; that thereupon, theretofore, to wit, on the 19th of February,
1846, in consideration that the plaintiffs, at the request of the now
defendant; would consent to stay all further proceedings in the said
action against the said W. F. Black, G. Mackintosh, and F. I. van
Zeller, until the 1st of May then next, and also in further consideration
that the plaintiffs *would proceed to trial with the said action against the
said H. F. Wollaston, at the first sitting of nisi prius of the said court,
which should be holden in and for the city of London in Easter term then
next, or so soon after as the practice of the said court would admit,* the
*675] defendant *did then guaranty, and then undertake and promise
to and with the now plaintiffs, that he, the defendant, would hold
them, the now plaintiffs, and each of them, harmless and indemnified
against all costs, charges, and expenses in any manner connected with
the said action to be tried at their suit against the said H. F. Wollaston
as aforesaid, *whether the same should be decided in favour of the plain-
tiffs or of the said H. F. Wollaston,* and that he the defendant would
pay the same costs, charges, and expenses, whenever requested so to do
by the plaintiffs: Averment, that the plaintiffs, relying on, and confiding
in, the said promise of the defendant, did, to wit, on the said 19th of
February, 1846, consent to stay, and did then stay, and the plaintiffs,
from the time of the making of the said promise by the defendant as
aforesaid, did consent to stay, and did stay, all further proceedings in
the said action against the said W. F. Black, G. Mackintosh, and F. I.
van Zeller, until the said 1st of May next after the making of the said
promise by the defendant, to wit, until the 1st of May, 1846, and thence
for a long time afterwards, to wit, hitherto; that the plaintiffs, further

relying on the said promise so made by the defendant as aforesaid, did proceed to trial with the said action against the said H. F. Wollaston at the said first sittings of nisi prius of the said court of Exchequer in and for the said city of London holden in Easter term next following the making of the defendant's said promise, to wit, at the sitting of nisi prius of the said court held on the 30th of April, 1846, in Easter term in the same year, in and for the city of London, at the Guildhall in the said city, before the Right Hon. Sir F. POLLOCK, knight, Her Majesty's lord chief baron of the said court; that the plaintiffs, at the said first sittings so holden as aforesaid, to wit, on the day and year last aforesaid, did cause to be tried, and the said *last-mentioned action against the said H. F. Wollaston was then, at the same sittings, accord- [*676
ingly tried before the said Sir F. POLLOCK, being such chief baron as aforesaid, and a jury in that behalf then duly sworn and chosen; that the jury by whom the same action was so tried then found and returned a verdict for the plaintiffs in the said action, for the said sum of 252*l.* 12*s.* 2*d.*, and 2*l.* costs; that, afterwards, to wit, on the 8th of May, 1846, in Easter term, 9 Vict., the said verdict, so found for the plaintiffs in the said action against the said H. F. Wollaston, was, by rule of the said court then made in the said action, set aside, and a new trial therein ordered, upon payment of costs by the (then) defendant to the said plaintiffs, their attorney or agent; that thereupon, the said action against the said H. F. Wollaston was afterwards, to wit, on the day and year last aforesaid, again set down for trial at the sittings of nisi prius of the said court, to be holden in and for the said city of London after Trinity term, 1846; that, before the said action against the said H. F. Wollaston could come or did come on to be tried such second time as aforesaid, the nisi prius record was, on, to wit, the 7th of July, 1846, withdrawn by the direction and at the request of the defendant; that the plaintiffs did incur and were put to, and did sustain, and had incurred, and been put to and sustained, divers costs, charges, and expenses in connexion with, and in relation to, and in and about the said action against the said H. F. Wollaston, so tried at their suit as aforesaid, amounting in the whole to a large sum of money, to wit, 100*l.*, which the plaintiffs afterwards, to wit, on the 26th of January, 1847, were called upon, and were then forced and obliged to, and did then pay to their attorneys, that is to say, to certain persons using the name, style, and firm of H. & A., the attorneys for the plaintiffs conducting and prosecuting, for them the plaintiffs, the said action *against the said H. F. Wollaston to trial as aforesaid,—of all [*677
which said several premises the defendant, afterwards, to wit, on the day and year last aforesaid, had notice, and was then requested by the plaintiffs to pay them the said sum of money, to wit, the said sum of 100*l.* so by them paid to the said attorneys of the plaintiffs as aforesaid: yet that the defendant, not regarding his said promise, did not pay the same, or any part thereof, nor hold the plaintiffs, or any or either of

them, harmless or indemnified against the said costs, charges, or expenses, or any part thereof, so connected with, and relating to, and incurred in and about the said action at their suit against the said H. F. Wollaston, and amounting to the said sum of money, but the defendant had always theretofore refused so to do; nor did nor would the defendant, when he was requested by the plaintiffs so to do as aforesaid, pay them the said costs, charges, or expenses, or any part thereof, amounting to the said sum of money, to wit, the said sum of 100*l.* which the plaintiffs were so forced and obliged to and did pay to their said attorneys as aforesaid; and the defendant had hitherto altogether neglected and refused to pay the amount, or any part thereof, to the plaintiffs' damage, &c.

Special demurrer, assigning for causes,—that it appears from the said first count, that one of the considerations for the promise by the defendant, was, that the plaintiffs would proceed to trial with the said action against the said H. F. Wollaston, in such a manner that the said action should be decided in favour of the plaintiffs or of the said H. F. Wollaston, but it is not averred or shown in the said declaration, that the plaintiffs did proceed, or have proceeded, to any decisive trial of the said action, or that the said action has been decided one way or the other, nor is it averred that the plaintiffs were ready to proceed to such trial, and *678] that they were *requested by the defendant not to do so, or were prevented by the defendant from so doing, but, on the contrary, it appears from the said first count, that the said action is still pending and undecided, and it is not averred that the plaintiffs were or are ready to proceed to a decisive and effectual trial thereof,—that it is no sufficient excuse for not proceeding to trial at all, that, on one particular occasion the record was withdrawn at the request of the defendant, and that, although such withdrawal may be a sufficient excuse for not proceeding to trial so soon as the practice of the said court would admit, according to the said contract, it is no sufficient excuse for neglecting to proceed to trial of the said action altogether, or for not procuring the same to be decided one way or the other; and the said first count ought to have alleged that the plaintiffs were ready to proceed to such trial, and procure the said action to be decided, and ought then to have shown a sufficient excuse for their neglecting so to do,—that the said first count is bad, in this, that it appears from the whole tenor of the said contract and promise therein mentioned, that the defendant was not liable to indemnify the plaintiffs from all costs connected with the said action, until the same should have been decided in favour of the plaintiffs or of the said H. F. Wollaston, but it is not shown or averred in the said first count that the said action has been decided in any way, nor is there any sufficient excuse averred in the said first count why the said action has not been decided, or proceeded with to a decisive and effectual trial on the merits,—that the said first count is uncertain and ambiguous, in this, that the said new trial was ordered to be had, on payment of costs, and it is not stated

whether the said costs were paid, so as to entitle the defendant in the said action to the said new trial thereof; and that it is therefore uncertain whether the plaintiffs *mean to rely on the said first trial as an effectual and decisive trial of the said action; and that, if [*679 such costs were paid to the plaintiffs, it does not appear what other costs they could have incurred by reason of any other proceedings mentioned in the said first count,—and that the said first count is in other respects informal and insufficient, &c. Joinder.

Montague Smith, in support of the demurrer. The declaration, by way of inducement, states that the plaintiffs had commenced an action against Black and others, and another action against Wollaston; it then states that, in consideration that the plaintiffs would consent to stay all further proceedings in the action against Black until a given day, and would *proceed to trial* with the action against Wollaston at a certain sitting, or as soon after as the practice of the court would admit of,—the defendant undertook and promised to hold the plaintiffs harmless and indemnified against all costs, &c., in the action against Wollaston, *whether the same should be decided in favour of the plaintiffs or of Wollaston*; and that he would pay the *same* costs, &c., whenever requested so to do by the plaintiffs. The declaration then avers that the proceedings in the action against Black and others were stayed until the stipulated time, and that the plaintiffs proceeded to trial in the action against Wollaston, and obtained a verdict, but that such verdict was afterwards set aside, and a new trial directed; that the cause was again set down for trial, but that, before it could come on to be tried, the record was withdrawn by the direction and request of the defendant. The action against Wollaston not having been *decided*, this action is premature: the liability of the defendant to be called upon to reimburse the plaintiffs, could not arise until the action against Wollaston had been finally disposed of. If the fact had been, that *the record was withdrawn because the present defendant was desirous of putting an end to the action, the declaration should have so alleged. [V. WILLIAMS, J. Would not this declaration have been sufficient if it had simply alleged that the plaintiffs proceeded to trial against Wollaston, and obtained a verdict?] It is submitted that it would not. The plaintiffs were bound to go on and obtain judgment against him. [WILDE, C. J. And execution?] And execution. [CRESSWELL, J. Suppose a writ of error were brought?] It is not to be presumed that a writ of error will be brought: it will not be gratuitously assumed that a judgment of a competent court is wrong. At all events, that would be matter of averment to come from the other side. In actions for malicious arrest, the declaration always avers, in direct terms, that the action in which the arrest took place was determined. [CRESSWELL, J. There is an absolute engagement to pay the costs.] The declaration does not show with certainty upon what event

the alleged liability to pay the costs arose,—whether on the first occasion, or upon the withdrawal of the record.

Peacock, contra. The legal effect of the contract is, that the defendant will pay the costs, when requested. [CRESSWELL, J. What costs?] The costs incurred in proceeding to the trial of the action against Wollaston at the time mentioned. There is nothing on the face of the declaration to show that the obtaining a judgment in that action was a condition precedent to the plaintiffs' right to sue the defendant for those costs. The agreement clearly contemplated the proceeding to trial at the first sitting only. Suppose Wollaston had obtained a verdict on that occasion, would the plaintiffs have been bound to move to set aside the verdict and obtain a new trial, before they could call upon the present defendant to reimburse them their costs?

*681] *M. Smith*, in reply. If the construction contended for on the other side is correct, the declaration is clearly ambiguous. The true meaning of the 'agreement is, that the defendant is to pay the costs when the cause is finally *decided*. It never could have been contemplated that the plaintiffs were to be at liberty to stop at any period of the cause. [WILDE, C. J. It might have been an imprudent thing,—in reference to the other action,—for the plaintiffs to bind themselves to proceed to *judgment* against Wollaston.] The question is not, what was prudent, but what the plaintiffs have in fact stipulated for.

WILDE, C. J. I am of opinion that the plaintiffs in this case are entitled to judgment. It must be admitted that it is not an easy task to ascertain the meaning of the parties, from the terms of the agreement they have entered into. However, I think I can discover sufficient to justify the conclusion at which I have arrived. The declaration sets forth a twofold promise,—first, a promise to hold the plaintiffs harmless, and indemnify them against all costs, charges, and expenses in any manner connected with the action to be tried at their suit against Wollaston,—and, secondly, a promise, in aid of the former, that the defendant would pay the same costs, charges, and expenses, whenever requested so to do by the plaintiffs. There is, therefore, a distinct allegation of a promise which the defendant is liable to be called upon to perform. But, inasmuch as the first promise is a promise to indemnify against the costs of the action against Wollaston, "whether the same should be *decided* in favour of the plaintiffs or of Wollaston," it is insisted, on the part of the present defendant, that he was not liable to be called upon to perform his promise until the action against Wollaston had been *decided*, or, in other *682] words, that the final determination of that action was a condition precedent to the now defendant's liability to perform the engagement he had entered into. It does not strike me that that is the fair effect of those words: it seems to me that they were introduced solely for the purpose of showing that the defendant's contract of indemnity was to be wholly independent of the result of the former action.

We are left without the means of forming an opinion as to what was the inducement for the defendant's entering into the contract. But the declaration discloses a detriment sustained by the plaintiffs, in staying the proceedings in the action against Black, at the instance of the defendant, and that is a sufficient consideration for the defendant's promise. Being plaintiffs in two actions, they, at the defendant's request, abstain from proceeding in one of them, and consent to go to trial in the other: there is, therefore, a perfectly good consideration, though the defendant's motive for entering into the engagement, or the benefit to result to him therefrom, is not apparent. The parties, no doubt, contemplated that the trial of the action against Wollaston would be a decisive event. There is no ground for presuming that the defendant had any interest in the action's proceeding further than a verdict. The defendant having, in consideration of the plaintiffs' consenting to proceed to *trial*, promised to indemnify them against the costs of the *action*, further agrees that he will pay the same costs, that is, the costs of the action, whenever requested so to do by the plaintiffs. Some reliance has been placed upon the use of the expression "costs of the *action*." I think, however, the expression used was the only one that was apt and proper to convey the real meaning of the parties, and that the change of phrase introduces no ambiguity. An undertaking simply to pay the *costs of the trial*, clearly would not have been what was intended. It is said that the defendant's *liability was only to arise upon the final legal determination and [*683 result of the cause,—as in cases of excessive arrest or malicious prosecution. The contract, however, as I read it, imports an absolute indemnity against the costs of the action against Wollaston, whatever its result, in consideration of the plaintiffs' staying the proceedings in the action against Black, and proceeding to try that against Wollaston, and also an absolute and distinct promise to pay those costs, upon request. I find nothing to show that the legal effect of the contract is not such as the pleader has stated it to be. The case certainly is not free from difficulty. Suppose the plaintiffs proceeded to trial against Wollaston, and to judgment and execution; was the defendant to pay the costs up to the trial only, or how much further? The defendant has put his own construction upon his contract; for, there having been a trial and verdict, and a rule made absolute for a new trial, he assumes that he has not done with the matter, by interfering to cause the record to be withdrawn. Upon the whole, I think it sufficiently appears upon the face of the declaration, that the defendant has made himself responsible for the costs of the action against Wollaston, and, consequently, the plaintiffs are entitled to judgment.

COLTMAN, J. I am of the same opinion. One can easily conjecture how such an agreement as this came to be entered into. Black and Wollaston probably were members of a committee of a railway company; and the defendant, being desirous to protect Black, was anxious that the

action against Wollaston should proceed, in order to compel him to bear his proportion of the liabilities of the concern. In order to meet the object of such an agreement, it might be necessary for the parties to proceed to trial, but possibly it might not have been *in their contemplation to go further. The consideration stated in the declaration is—"in consideration that the plaintiffs, at the request of the now defendant, would consent to stay all further proceedings in the said action against Black until the first of May then next, and would proceed to trial with the action against Wollaston at the first sitting of the court of Exchequer, in London, in the next Easter term, or as soon after as the practice of the court would admit of." The defendant now seeks to engraft on it something more, *viz.* that "they would proceed to final judgment in the last-mentioned action," which would be introducing by implication a consideration which does not appear in direct terms. And, as that would be a material variation from the contract alleged, I think we ought not to import it, unless we could see that it was clearly to be inferred. I entirely agree with the lord chief justice in the construction he has put upon the promise as alleged. The object of the parties evidently was, that the plaintiffs should be indemnified against the costs of the action against Wollaston, whether they were successful or not. It does not appear to me to be *necessarily* implied that the action should be prosecuted to final judgment. Upon the whole, I think, though the case is not quite free from difficulty, that the plaintiffs have shown sufficient to entitle them to maintain this action.

CRESSWELL, J. I concur with the lord chief justice and my brother COLTMAN in giving judgment for the plaintiff in this case, although I do not profess to have arrived at any very clear understanding of the contract stated in the declaration. Where the intention of the parties to a contract is sufficiently apparent, effect must be given to it in that sense, though some violence be thereby done to its words. Where the intention is doubtful, the safest course is, to take the words in their *ordinary sense. Now, what are the words of this contract? They are—"in consideration that the plaintiffs, at the request of the now defendant, would consent to stay all further proceedings in the action against Black, until the first of May then next, and also in further consideration that the plaintiffs(a) would proceed to trial with the action against Wollaston, at, &c." That consideration the defendant has had. Then comes the promise:—"The defendant did then guaranty and then undertake and promise to and with the now plaintiffs, that he, the defendant, would hold them the plaintiffs, and each of them, harmless and indemnified against all costs, charges, and expenses in any manner connected with the said action to be tried at their suit against Wollaston, as aforesaid, *whether the same should be decided in favour of the plaintiffs or of*

(a) Not alleging (as unnecessarily alleged with respect to the former part of this executory consideration) that it was at the defendant's request.

Wollaston ; and that, he the defendant, would pay the *same* costs, charges, and expenses, whenever requested so to do by the plaintiffs." It is argued, on the one side, that this means that the defendant is to indemnify the plaintiffs against the whole costs of the action, and therefore that the action must be finally disposed of and determined before the defendant's liability could arise. On the other hand, it is said, all that the consideration fairly imports, is, that the plaintiffs were to proceed *to trial* in the action against *Wollaston*. The natural meaning of the words certainly is, that the plaintiffs were to carry the cause to trial : and it is by no means clear that they were bound to do anything more. I also agree with the lord chief justice and my brother COLTMAN in the construction they put upon the words "whether the same should be decided in favour of the plaintiffs or of *Wollaston*," viz. that the contract is to be *performed, without reference to the success or the failure of the plaintiffs in that action. It seems to me that this is the safer construction to put upon the entire contract, in the absence of anything clearly ascertained to the contrary, and that the defendant has in truth all that he bargained for. [686

V. WILLIAMS, J. I am of the same opinion. Whether or not the statement in the declaration truly represents the real contract between the parties, we have no means of knowing. As it appears upon the face of the declaration, I think it means this,—the defendant says to the plaintiffs,—“If you will stay the proceedings in the action against *Black*, and will proceed to trial with the action against *Wollaston* at such a sitting, I will indemnify you against all costs and expenses in any manner connected with the last-mentioned action, whether the same shall be decided in your favour or in *Wollaston's*; and I will pay those costs and expenses whenever requested so to do.” The plaintiffs aver performance of this agreement on their part, in terms : and the defendant, in answer, says, that one of the considerations for his promise was, that the plaintiffs should so proceed with the action against *Wollaston*, that the cause should be finally determined. No such consideration, however, is stated upon the record : and we cannot assume it. The costs to be paid by the defendant, are, costs connected with the action against *Wollaston* ; and they are equally so, whether incurred before or after final judgment. The defendant's liability is to be quite irrespective of the plaintiff's success or failure in that action.

If the defendant is prejudiced by the decision we have come to, he must take that as the necessary consequence of the manner in which he has worded his contract.

Judgment for the plaintiffs.

*687]

*FISH v. KEMPTON. April 16.

A. buys goods of B., knowing that B. is selling them as factor. He cannot, in an action by the principal for the price, set off a debt due to him from B., although it is found that A. made the purchase *bona fide*.

But, *semble*, that payment to B., though made prematurely, would, if made *bona fide*, bind the principal.

THIS was an action of debt and detainue. The first count of the declaration was in debt for goods, chattels, and effects sold and delivered; the second was in detainue for certain leather alleged to have come to the possession of the defendant by finding.

To the first count, the defendant pleaded,—first, never indebted,—secondly, payment,—thirdly, that the said goods, chattels, and effects in the first count mentioned, were sold and delivered as therein mentioned, through the agency of certain persons, to wit, William Tanner and John Ward, who, at the time of the said sale and delivery, were the agents and factors of and for the plaintiff, and intrusted by him, as such agents, with the said goods, chattels, and effects, and, with the assent of the plaintiff, to wit, on the day and year in the said first count mentioned, sold them to the defendant, in their, the said William Tanner and John Ward's own names, as the true and sole owners thereof, and then appeared to be the true and sole owners thereof by the plaintiff's consent; that the plaintiff did not, at or before the time of the sale and delivery in the first count mentioned, of the said goods, chattels, and effects to the defendant, appear, nor was he then known by the defendant, as the proprietor of, or interested in, the said goods, chattels, and effects, or any or either of them; that he, the defendant, then bought and accepted and received the said goods, chattels, and effects of and from the said William Tanner and John Ward, as the proper goods, chattels, and effects of the said William Tanner and John Ward, and

*688] *that credit for the said goods, chattels, and effects was given to the defendant by the said William Tanner and John Ward; that the said William Tanner and John Ward, before and at the time of the said sale and delivery of the said goods, chattels, and effects, and thence continually had been, and still were, indebted to the defendant in a large sum of money, to wit, the sum of 6100*l.*, for goods before then sold and delivered by the defendant to the said William Tanner and John Ward, at their request, and for goods bargained and sold, &c., which said sum so due to the defendant equals the supposed debt above demanded, and all damages by the plaintiff sustained by reason of the detention thereof, and against which said sum of money so due to the defendant, he the defendant was ready and willing, and thereby offered to set off and allow, &c. &c.; verification.

To the last count, the defendant pleaded,—first, that he did not detain the goods in that count mentioned,—secondly, not possessed.

The plaintiff joined issue on the first, second, fourth, and fifth pleas,

and replied to the third, "that the said William Tanner and John Ward did not, with the assent of the plaintiff, sell the said goods and chattels to the defendant, in their own names, as the true and sole owners thereof, and did not appear to be the true and sole owners thereof, with the plaintiff's consent, in manner and form as in the said third plea alleged, &c. Issue thereon.

The cause was tried before WILDE, C. J., at the sitting in London, after Hilary term last. The facts were as follows:—Tanner and Ward carried on a considerable business as leather-factors, in which capacity they had frequent dealings with the plaintiff. They sometimes also bought leather on their own account. In the month of November, 1847, a negotiation took place between Tanner and Ward and the defendant, relative to the *purchase by the defendant of a quantity of [*689 leather called "kips." The contract was concluded on the 23d; and the kips were delivered to the defendant on the evening of the 24th; and on the 25th Tanner & Ward stopped payment, and eventually became bankrupt,—the *fiat* against them bearing date the 18th of February, 1848.

At the time of the sale, Tanner & Ward were indebted to the defendant in a sum considerably exceeding the value of the kips.

After the bankruptcy of Tanner & Ward, the plaintiff, as principal, demanded from the defendant the price of the kips; and, upon his refusing to pay it, the present action was brought.

On the part of the defendant, it was insisted,—first, that the goods were sold by Tanner & Ward as principals, and not as factors,—secondly, that, assuming that Tanner & Ward sold as factors, and not as principals, still, upon the authority of *Warner v. M'Kay*, 1 M. & W. 591, the sale was subject to the state of accounts between the factors and the vendee.

For the plaintiffs, evidence was given for the purpose of showing, that, at the time he made the purchase, the defendant knew that Tanner & Ward were intrusted with the goods as factors, and that they were in failing circumstances, and consequently that the transaction was fraudulent.

In answer to questions put to them by the learned judge the jury found, that the goods were sold by Tanner & Ward as factors, and that the defendant bought them with knowledge of that fact; and that the purchase by the defendant was *bonâ fide*:(a) and they therefore, under the direction of his lordship, returned a verdict for the plaintiff for 190*l.*, the amount claimed.

**Byles*, Serjt., pursuant to leave reserved to him at the trial, now [*690 moved for a rule nisi to enter a verdict for the defendant, or a nonsuit. The finding of the jury removes the defendant from the first point made by him at the trial. The only question, therefore, that now remains, is, whether the knowledge of the vendee that the seller is dealing with the goods as factor, deprives the former of the right to set off

(a) Q. d. without any view of obtaining satisfaction of a bad or a doubtful debt, at the expense of the plaintiff.

a debt due to him from the seller. It is submitted, upon principle, as well as authority, that it does not. *Warner v. M'Kay* is precisely in point.^(a) There, before the first sale of the sugars in respect of which the action (by the principals) was brought, the defendant knew that B. & Co., from whom he purchased, sold as factors; and the names of the principals were communicated to him before the set-off was incurred. The jury here found that the defendant acted *bond fide*: and he had a right to suppose that Tanner & Ward were acting honestly. [WILDE, C. J. How can the principal, unless he has done something to accredit the factors, be affected by the defendant's belief or *bona fides*?] The ruling of PARKE, B., is distinct upon the subject. [CRESSWELL, J. Is not that in effect overruled by what afterwards took place in *banco*?] It is submitted that it is not. [WILDE, C. J. Lord ABINGER, C. B., treats it as a case of *payment*.] If premature payment will protect, *a fortiori* will a set-off. [WILDE, C. J. *Payment*, though made prematurely, puts the factor in a position to do justice to his principal; and *set-off* does not. There is a large class of cases wherein the difference between set-off and payment has been well ascertained. I have always understood *payment* to a factor to be good, inasmuch as it enables him *691] to settle with his principal; but that, *where a man buys goods of a factor, knowing him to be dealing as such, and the principal has done nothing to accredit the factor as one dealing on his own account, he is not bound by a claim of set-off as between the factor and the vendee. At what period could the plaintiff here have brought an action for money had and received against Tanner & Ward?] The general replication *de injuriâ* could not have been adopted in this case, the plea involving an authority from the plaintiff, and so falling within the third exception in the rule in *Crogate's case*, 8 Co. Rep. 66,—*Salter v. Purchell*, 1 Q. B. 209. Accordingly, the plaintiff, admitting the set-off, replies that Tanner & Ward did not, with the assent of the plaintiff, sell the said goods and chattels to the defendant in their own names, as the true and sole owners thereof, and did not appear to be the true and sole owners thereof, with the plaintiff's consent. The jury found that the defendant made the purchase *bond fide*. [CRESSWELL, J. They found that Tanner & Ward sold *as factors*, and that the defendant bought of them knowing them to be selling *as factors*. That disposes of the issue in favour of the plaintiff.] If that be the true meaning of the issue, the replication is no answer to the plea, and the defendant will be entitled to judgment *non obstante veredicto*. [WILDE, C. J. The plea sets up an honest case; but you seek to use it for a different purpose.]

WILDE, C. J. In all these cases of set-off, the law endeavours to meet the real honesty and justice of the case. Where goods are placed in the hands of a factor for sale, and are sold by him under circumstances that are calculated to induce, and do induce, a purchaser to be-

(a) See remarks upon this case, in *Smart v. Sandars*, 3 Man. Gr. & S. 399.

lieve that he is dealing with his own goods, the principal is not permitted afterwards to *turn round and tell the vendee that the character [*692 he himself has allowed the factor to assume, did not really belong to him. The purchaser may have bought for the express purpose of setting off the price of the goods against a debt due to him from the seller. But the case is different where the purchaser has notice at the time that the seller is acting merely as the agent of another. In that case, there would be no honesty in allowing the purchaser to set off a bad debt, at the expense of the principal. This, I consider to be clear and settled law: and I think we are bound not to exhibit any doubt, where none should exist, by granting a rule. The case of *Warner v. M'Kay*, as ultimately decided, in no degree breaks in upon the principle I have stated. It is quite clear that the court there do not adopt the idea that the vendee has a right to set off a debt due to him against the price of goods bought by him of a factor with knowledge that he sells as factor: but they put the case upon a ground which prevents it from having any bearing upon the present case, *viz.* that there the vendee had *paid* the factors. Where a factor sells, with notice to the vendee that he sells as factor, *payment* to him is good, even though made prematurely; but the vendee cannot, under such circumstances, claim a right of set-off. The substance of the third plea I consider to be this,—that the plaintiff induced the defendant to believe that Tanner & Ward were the true owners of the goods, and that the defendant purchased them in that belief. The replication, which traverses those allegations, therefore, traverses the substantial part of the plea. The law being well settled, I think there ought to be no rule.

COLTMAN, J. I am of the same opinion. The general rule undoubtedly is, that, where a factor sells as principal, the vendee may set off, in an action by the *principal for the price of the goods, a [*693 debt due to him from the factor; but that, where he sells as factor, no such set-off is allowed. That doctrine certainly was broken in upon by the ruling of PARKE, B., in *Warner v. M'Kay*. But the court of Exchequer seem to have felt that that ruling was not sustainable: they upheld the verdict there on the score that there had been a payment to the brokers, though a premature one. Whether that view was correct or not, the court refused to uphold the ruling of PARKE, B. That case, therefore, is no authority for the purpose for which it has been cited to-day.

CRESSWELL, J. I am of the same opinion. This is an attempt to extend the rule laid down in *Rabone v. Williams*, 7 T. R. 360,(a) and *George v. Clagett*, 7 T. R. 359, which has now been uniformly acted upon for many years. If a factor sells goods as owner, and the buyer *bond fide* purchases them in the belief that he is dealing with the owner, he may set off a debt due to him from the factor against a demand preferred by the principal. Lord MANSFIELD so lays down the rule distinctly in *Rabone v. Williams*. "Where," he says, "factor, dealing for

a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and, though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled." The distinction between a factor and a broker is noticed by ABBOTT, C. J., and BAYLEY, J., in *Baring v. Corrie*, 2 B. & Ald. 137.

*694] ABBOTT, C. J., says: "The distinction between a broker *and a factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant, residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation: he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name. In all the cases cited, the factor was in actual possession of the goods, and the purchasers could not know whether they belonged to him or not: and, at all events, they knew that he had a right to sell the goods." And BAYLEY, J., adds: "It is besides to be observed that the plaintiffs did not trust the brokers with either the muniments of their title, or the possession of the goods, as was done both in the case of *Rabone v. Williams* and that of *George v. Clagett*." With regard to *Warner v. M'Kay*, I must confess I never could satisfy myself as to the precise ground upon which that case was decided.

V. WILLIAMS, J. I am of the same opinion. The doctrine of *George v. Clagett*, and that class of cases, has no application, where the buyer knows that the factor sells as factor. Rule refused.

*695] *CUNLIFFE and Another v. MALTASS. May 5.

An affidavit of debt alleging several distinct and separate causes of action for separate and distinct sums, some of which are well stated, and others not, is not therefore bad altogether.

A *capias* issued under a judge's order pursuant to the 1 & 2 Vict. c. 110, s. 3, endorsed for bail for 1050*l.*, upon an affidavit stating distinct causes of action for four several amounts, three of them correctly, and one (for 500*l.*) imperfectly. The defendant, having been arrested, applied to a judge at chambers to discharge him out of custody. The judge declined to discharge the defendant, but made an order reducing the amount to be taken for bail by the 500*l.* so defectively alleged:—

The court refused to rescind the order.

ON the 3d of March last, an order was made in this cause by PATTERSON, J., at chambers—that the plaintiff be at liberty to issue one or more

writs of *capias*, *alias*, or *pluries capias*, against the defendant, endorsed to hold him to bail for the sum of 1050*l*.

The affidavit upon which the learned judge was induced to make that order, was as follows:—

“James Cunliffe, of, &c., maketh oath and saith that the above-named defendant, William George Maltass, is justly and truly indebted unto this deponent and to Samuel Brooks, his co-partner (surviving partners of William Brooks, deceased), in the sum of 1050*l*., being *the balance due for principal on four several bills of exchange*,—one thereof being a bill dated the 7th of February, 1846, drawn by the said W. G. Maltass on, and accepted by, C. A. Calvert, for 400*l*., payable, at three months’ date, to the order of Messrs. Keyser & Wilkin, and by them endorsed to Messrs. Beattie & Co., and by them endorsed to this deponent and his said co-partner and the said William Brooks, deceased, in his lifetime; which said bill of exchange was duly presented for payment when due, and was dishonoured, and due notice of the dishonour thereof given to the said W. G. Maltass,—another thereof being a bill of exchange dated the 7th of March, 1846, drawn by the said Messrs. Keyser & Wilkin on, and accepted by, *the said Messrs. Beattie & Co., for 500*l*., payable, at three months’ date, to the order of the said W. G. Maltass, [*696 and by him endorsed to the said C. A. Calvert, and by the said C. A. Calvert endorsed to this deponent and his said partner and the said William Brooks, deceased, in his lifetime,—another of the said four bills of exchange, dated the 12th of March, 1846, drawn by one Giuseppe Bargigli, on, and accepted by, the said Messrs. Beattie & Co., for 250*l*., payable to the order of the said W. G. Maltass, at three months, and by the said W. G. Maltass endorsed to the said C. A. Calvert, and by him to this deponent and his said co-partner and the said William Brooks, deceased, in his lifetime; which said bill of exchange was duly presented for payment on the day when it became due, and was dishonoured, and due notice of its dishonour was given to the said W. G. Maltass,—and the other of the said four bills of exchange dated the 12th of March, 1846, drawn by the said G. Bargigli on, and accepted by, the said Messrs. Beattie & Co., for 400*l*., payable to the order of the said W. G. Maltass, the defendant, at three months’ date, and by the said W. G. Maltass endorsed to the said C. A. Calvert, and by him endorsed to this deponent and his said co-partner and the said W. Brooks, deceased, in his lifetime; which said bill was duly presented for payment on the day when it became due, and was dishonoured, and due notice of its dishonour was given to the said W. G. Maltass. And this deponent further saith that all the said four bills of exchange are overdue, and the said sum of 1050*l*. still remains due and owing to this deponent and his said co-partner, as surviving partners of the said William Brooks, deceased, *for principal money on the said four bills of exchange.*(a)

(a) The aggregate being 1550*l*.

*697] And this *deponent further saith that he and his said co-partner are in danger of losing their said debt, unless the defendant be held to bail. And this deponent further saith that he hath been informed, and believes, that the said defendant is about leaving England for foreign parts."

The defendant was arrested on the 3d of March upon a *capias* issued upon this order, endorsed for bail for 1050*l*.

A summons was afterwards taken out, on behalf of the defendant, calling upon the plaintiffs to show cause why he should not be discharged out of custody. This summons came on to be heard, before PATTESON, J., on the 10th of March, 1849, when,—it appearing to the learned judge that the affidavit upon which the former order was made, did not disclose a cause of action as the second bill mentioned in such affidavit,—that learned judge made the following order:—"That the amount for which bail is to be given in this cause, be reduced to the sum of 550*l*., that the defendant be at liberty to pay that sum, and 20*l*. for costs, under the statute, into court, in lieu of bail, and that he be thereupon discharged out of custody."

Special bail having been put in and perfected, under the order of a judge, without prejudice to an application to the court to rescind the former orders,

Channell, Serjt., on a former day in this term, moved for a rule calling upon the plaintiffs to show cause why the two orders of PATTESON, J., should not be rescinded, why the writ of *capias* issued in pursuance of the first order should not be set aside, and why the recognisance of the defendant's special bail put in and perfected should not be vacated, or why an *exoneretur* should not be entered on the bail-piece in this action, *698] on the defendant's entering a common appearance, on *the ground that the affidavit upon which the defendant was so held to bail, was insufficient, inasmuch as it showed no cause of action for the amount for which the defendant was so held to bail. The defect in the affidavit was, that as to the bill for 500*l*., dated the 7th of March, 1846, it did not allege that the bill had been presented and dishonoured, and that the defendant had notice of dishonour. He referred to *Kirk v. Almond*, 2 C. & J. 354, 1 Dowl. P. C. 318, 2 Tywh. 316, and *Drake v. Harding*, 1 Harr. & W. 364, as authorities to show that an affidavit bad in part is bad altogether; and submitted, that, although these cases seemed to have been overruled by *Jones v. Collins*, 6 Dowl. P. C. 526, yet that case was distinguishable, upon the ground that here the affidavit had been acted upon, and the defendant actually arrested upon a writ endorsed for the entire sum: *Caunce v. Rigby*, 3 M. & W. 67. [V. WILLIAMS, J., referred to *The Bank of England v. Reid*, 8 Dowl. P. C. 848, where PARKE, B., upon *Kirk v. Almond* being cited, said: "That case has been disapproved of, and is only acted upon when the part which is good cannot be distinguished from that which is bad."]

A rule nisi having been granted,

Byles, Serjt., and *Taprell*, now showed cause. The authorities clearly establish that, although an affidavit to hold to bail may be insufficient as to part, the defendant may still be held to bail for the amount that is well sworn to, provided it be separable from the bad part; and that the amount may be reduced even after a *capias* has issued and been acted upon. The cases of *Kirk v. Almond* and *Drake v. Harding* are no longer considered law. In *Prior v. Lucas*, 1 Harr. & W. 365, n.—which *occurred at chambers before LITTLEDALE, J.,—the affidavit of debt stated that the defendant was indebted to the plaintiff in 50*l*. [*699 for goods sold and delivered to the defendant at his request, and in '26*l*. on a bill of exchange, the amount of which was not stated. LITTLEDALE, J., said that it was true that there were two decisions of the court of Exchequer,—*Baker v. Wills*, 1 C. & M. 238, 1 Dowl. P. C. 631, and *Kirk v. Almond*,—that an affidavit of debt bad in part is bad altogether; but that he thought those cases had not been properly decided; that he had conversed with the judges on the point, and believed that the barons themselves had adopted the same opinion: and, accordingly, he made an order to discharge the defendant, on giving bail for 50*l*. So, in *Jones v. Collins*, it was distinctly held that an affidavit of debt stating two causes of action, one imperfectly, and the other correctly, is not bad altogether, but the defendant may be held to bail for the latter, if separate from, and independent of, the former. WILLIAMS, J., after time taken for deliberation there,—having first disposed of other points in the case,—says: “Next comes the question, on which there has been a variation in the decisions, whether, when there are two distinct and separate causes of action stated in an affidavit of debt, one of which is bad, and the other good, the arrest being for the joint amount, the affidavit is bad altogether. It has been held, undoubtedly, to be bad altogether; and that opinion has been for a long time acted upon. In *Kirk v. Almond*, it was held that an affidavit which was good in part and bad in part was bad altogether, and the defendant was discharged out of custody. That case was acted on for some time; as, in the case of *Drake v. Harding*, by my brother COLERIDGE. But since that time there has been a variation in the opinions of the judges, which it is *unnecessary now [*700 to trace. In the case of *Prior v. Lucas*,—which is in a note to the report of the case of *Drake v. Harding*, and which was before my brother LITTLEDALE at chambers, the report states that the cases in the court of Exchequer, of *Baker v. Wills* and *Kirk v. Almond*, were referred to, and that my brother LITTLEDALE did not agree with those decisions, and that he had consulted with the other judges on the subject. I have seen my brother LITTLEDALE, and he says that the report of that case is correct, and that he did, on that occasion, consult the other judges; and the result is, that the cases of *Drake v. Harding* and *Kirk v. Almond* are no longer to be considered as good law; the case of *Prior v. Lucas*

establishing this rule, that where the total amount sworn to is not mixed up with that which is partly good and partly bad, but distinct and separate causes of action, in separate amounts, are sworn to, one of which is properly, and the other improperly sworn to, the affidavit is good as to that amount in respect of which it is correct, and that the court will not discharge the defendant altogether for such objection." That decision received the sanction of PARKE, B., in *The Bank of England v. Reid*. Here, as to three of the bills, amounting together to 1050*l.*, the affidavit shows a clear and distinct cause of action; as to the fourth, a bill for 500*l.*, it must be conceded that the affidavit is defective: but, applying the 500*l.* paid on account, to the amount that is sufficiently sworn to, the affidavit shows at least 550*l.* for which the defendant might well be held to bail.

Channell, Serjt., in support of the rule. It is not disputed, that, if the original affidavit was good, the first order was well made; nor is it denied that the second order was good, if the learned judge had power *701] to correct the first. The fair result of the cases is, that, *where an affidavit states any part of the cause of action defectively, the part for which it is proposed to use it must be clearly severable from the rest,—as in *The Bank of England v. Reid*. But in no case has it been held that the bad part of the affidavit can be rejected, after it has once been acted upon in its entirety. [CRESSWELL, J. Was it not so used in the cases of *Prior v. Lucas* and *Jones v. Collins*?] No such point seems to have been made in either of those cases at the bar, nor was it adverted to by the court. And the observations of ALDERSON, B., in the case of *Caunce v. Rigby*, seem to show that this was the impression of that learned judge. The marginal note of that case states, that, if an affidavit be good as to one distinct sum stated in it, and that be an arrestable amount, it is no objection that it is bad as to another sum stated in it, *unless it appears that process has issued on it for the whole amount*, and not for the former sum only. Upon its being urged by the counsel for the defendant that "*Kirk v. Almond* and *Baker v. Wills* are authorities that an affidavit of debt, bad in part is bad altogether," ALDERSON, B., says: "*No doubt if it were shown that the defendant was arrested for the whole amount.*" The policy of the law of late years has been to limit the right to imprison a debtor.

WILDE, C. J. This is a rule calling upon the plaintiffs to show cause why two orders of PATTESON, J., should not be rescinded, the writ of *capias* issued in pursuance of the first of those orders set aside, the recognisance of bail vacated, and an *exoneretur* entered on the bail-piece. The case comes before the court under the statute 1 & 2 Vict. c. 110, which gives authority to a judge of either of the superior courts, under certain circumstances, to make an order to hold a defendant to bail. *702] Originally, the *capias* was the *commencement of the action; and such *capias* was not deemed irregular because improperly

endorsed as to the amount of bail to be taken. When the writ was endorsed for an amount not warranted by the affidavit, the course was, not to move to set aside the *capias*, but to discharge the defendant upon his entering an appearance and filing common bail,—leaving the *capias* still to be the commencement of the action. It is now no longer the *capias*, but the writ of summons that is the commencement of the suit: the *capias* issues for a collateral purpose; and it may issue at any time before final judgment. The words of the 3d section of the statute are—that, “if a plaintiff in any action in any of Her Majesty’s superior courts of law at Westminster, in which the defendant is now liable to arrest, whether upon the order of a judge or without such order, shall, by the affidavit of himself or some other person, show to the satisfaction of a judge of one of the said superior courts, that such plaintiff has a cause of action against the defendant or defendants to the amount of 20*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant, or any one or more of the defendants, is or are about to quit England, unless he or they be forthwith apprehended, it shall be lawful for such judge, by a special order, to direct that such defendant or defendants so about to quit England, shall be held to bail for such sum as such judge shall think fit, not exceeding the amount of the debt or damages; and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of *capias*, into one or more different counties, as the case may require,” &c. The arrest, therefore, now takes place, not by force of the affidavit stating the amount of the debt, but for such amount as the judge in his *discretion may think fit; such discretion, of course, to be exercised, not arbitrarily, but according to the practice of the court. [*703

The regularity or irregularity of the affidavit, therefore, does not stand quite upon the same footing as it did before. In the present case, the learned judge made an order that a *capias* issue endorsed for 1050*l.*, the sum alleged in the affidavit to be due for principal. Formerly, when an ordinary *capias* issued, the court required the affidavit to contain a distinct statement of the amount of the debt. In administering the law under the statute in question, they have adhered to that practice, and still require the affidavit to be certain to a certain intent. The affidavit presented to the learned judge here, stated that the defendant was indebted to the plaintiffs in the sum of 1050*l.*, being the balance due for principal on four several bills of exchange, describing them, and which four bills in the aggregate exceeded, by 500*l.*, the sum claimed to be due. The judge accordingly directed the *capias* to issue for 1050*l.*; and the defendant was thereupon arrested. The defendant afterwards went before the judge, not for the purpose of asking that the order might be discharged, but that he himself might be discharged out of custody, on the ground that the whole sum endorsed on the writ was not properly sworn

to. The learned judge,—looking more minutely at the affidavit, and finding that it did not disclose enough to warrant the arrest of the defendant as to a portion of the debt, inasmuch as it failed to describe a good cause of action against the defendant as to one of the bills,—took the view most favourable for the defendant, but, thinking that there must be at least 550*l.* due, made an order reducing the amount for which the defendant was to be held to bail, to that sum. That order has been acted upon,—the defendant having procured it to be modified by allowing him to pay into *704] court the 550*l.*, *and 20*l.* for costs, in lieu of bail. Having afterwards perfected special bail, the defendant now comes and asks the court to rescind the two orders, to set aside the *capias*, and to vacate the recognisance of bail,—upon the ground that the original affidavit did not warrant the issuing of a *capias* endorsed for the amount mentioned in the first order. I apprehend, however, the defendant is not now in a situation to make an application different from that which he made before the judge at chambers. The motion is founded upon the 6th section of the statute, which enacts “that it shall be lawful for any person arrested upon any such writ of *capias*, to apply, at any time after such arrest, to a judge of one of the superior courts at Westminster, or to the court in which the action shall have commenced, for an order or rule on the plaintiff in such action to show cause why the person arrested should not be discharged out of custody; and that it shall be lawful for such judge or court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such order therein as to such judge or court shall seem fit; provided that any such order made by a judge may be discharged or varied by the court, on application made thereto, by either party dissatisfied with such order.” When, therefore, the parties come before the court, the court is to make such order as it conceives the justice of the case to require. Now, justice requires that we should deal with the case as it was presented before the judge. That he had authority to make the order to the extent of 550*l.*, is conceded. The real objection is, that he erroneously exercised his discretion, by ordering the *capias* to issue for 1050*l.* We, therefore, cannot set aside the order altogether. It was admitted in argument that the authorities show that the circumstance of *705] a defendant's being arrested for *too large an amount affords no ground for his discharge, if the affidavit warrants the arrest up to a certain extent. Further, it is not disputed, that not only may the party be held to bail for the lesser amount, where the sum is distinctly, and in terms, stated in the affidavit, but also where it may fairly be collected therefrom. The authorities upon this subject are not impugned: but it is said they are not controlling authorities, because there is a point here that was not present in the cases referred to; and this consequence is sought to be deduced from the language of ALDERSON, B., in *Counce v. Rigby*. There, the plaintiff was proceeding to outlawry: the defendant

moved to set aside the *capias* and subsequent proceedings, on the ground of a defect in the affidavit to hold to bail: the affidavit stated that the defendant was indebted to the plaintiff in the sum of 31*l.* for work and labour done by him for the defendant at his request, and in the further sum of 20*l.* on a bill of exchange drawn by the defendant on one John Robinson, and endorsed to the plaintiff, "which said John Robinson made default in payment of the said bill when due." The objection was, that there was not a sufficient statement, as against the drawer, of the acceptor's default; and it was contended, on the authority of *Kirk v. Almond and Baker v. Wills*, that an affidavit of debt bad in part is bad altogether: upon which ALDERSON, B., says,—“No doubt, if it were shown that the defendant was arrested for the whole amount; but suppose it was only for the 31*l.*, would the court set it aside?” And, in giving judgment, the learned baron says: “I am not aware of any case in which a distinct part of an affidavit being good, and the amount mentioned in such good part only being endorsed on the *capias*, the affidavit has been held bad.” My brother Channell infers from this, that the proceedings would have been set aside, if the *capias* had been *en- [*706 dored for the larger amount. I think that is not a just inference from the language used by the learned baron. On the contrary, there are distinct authorities to show that the party is not entitled to that relief, but that the court will permit the defendant to be held to bail for so much as the affidavit well shows to be due. It is not denied here that the affidavit shows, in correct and formal terms, a debt due to the plaintiffs, to the extent of 550*l.* Upon the whole, therefore, I think that the justice of the case is well met by allowing the *capias* to stand for that sum, and, consequently, the rule for setting aside the orders of my brother PATTESON, will be discharged.

COLTMAN, J. I take it to be established by the cases, that if, before the statute 1 & 2 Vict. c. 110, a defendant was sought to be arrested upon an affidavit disclosing two distinct causes of action, one of which is well stated, and the other not, the party would not have been entitled to be discharged on filing common bail, but the bail would have been reduced to the amount properly shown to be due. None of the cases cited bear out the proposition of my brother Channell, except the two cases of *Kirk v. Almond* and *Drake v. Harding*, which have since been overruled. In point of good sense, I see no difference between a case where the affidavit distinctly discloses one good cause of action, and a case where it manifestly appears, upon looking at the whole affidavit, that a certain sum is due. This case arises upon the 3d section of the 1 & 2 Vict. c. 110. Upon that, the matter seems to me to be even more clear than upon the old law. By that section, two matters are referred to the judge,—the one, whether the plaintiff has a cause of action against the defendant to the amount of 20*l.*, or has sustained damage to that amount,—the other, whether there is probable cause for

*707] *believing that the defendant is about to quit England. When the judge makes an order to hold the defendant to bail for a particular amount, he is doing a judicial act. The question is, what is the mode of relief where the judge has directed a defendant to be held to bail for a larger sum than is warranted by the affidavit. The remedy is pointed out by the 6th section, which provides that any order made by a judge may be discharged or *varied* by the court, on application made thereto by either party dissatisfied therewith. That section, therefore, gives authority to the court to modify the order, by limiting the amount of bail. That has already been done in the present case.

CRESSWELL, J. I am entirely of the same opinion. It is beyond controversy that 550*l.* appears on the face of the affidavit to be due from the defendant to the plaintiff, upon bills of exchange for which the defendant is liable, by reason of presentment and non-payment by the acceptor, and notice of dishonour to the defendant, as drawer,—rejecting altogether the 500*l.* bill as to which the defendant's liability is defectively stated, and ascribing the 500*l.* paid, to the other bills as to which the defendant's liability is well alleged. There being, then, a perfectly good affidavit to hold to bail for 550*l.*, the judge had authority to order a *capias* to issue. It may be that he was in error in allowing the writ, in the first instance, to be endorsed for so large an amount. The only remedy for that is, to vary the order, under section 6. The whole thing is the creation of the statute. In *Hopkinson v. Salembier*, 7 Dowl. P. C. 493, where the defendant had been arrested under the 1 & 2 Vict. c. 110, s. 3, by virtue of a judge's order made upon an affidavit having the *same defect as the affidavit in this case, it was *708] held that the motion should be, not to set aside the *capias*, but to rescind the judge's order. The case is brought precisely within the principles that affected the *capias* under the old law. The cases of *Baker v. Wills*, *Kirk v. Almond*, and *Drake v. Harding*, were under review in *Jones v. Collins* and *The Bank of England v. Reid*. The result is, that, where the affidavit discloses a good cause of action, the defendant may be held to bail for that, notwithstanding the affidavit also states something further, which does not amount to a cause of action. It is suggested that there the point was not made, that, the party having originally been arrested for too large an amount, it was not competent to the plaintiff to hold him to bail for the lesser amount that was properly sworn to: But I cannot think the judge overlooked that.

V. WILLIAMS, J. I am of the same opinion. This is an appeal from the decision of my brother PATTESON. He clearly had authority to make the original order. The deponent does pledge his oath to the existence of the debt to the full amount of 1050*l.*, though, by reason of a technical omission, the affidavit fails to show a good cause of action as to 500*l.* Before the recent statute, the affidavit was conclusive: but now it is competent to the defendant to dispute the existence of the debt itself.

Rule discharged, with costs.

***DOE d. BENJAMIN HEMMING, Assignee of JOSEPH WILLETTS, an Insolvent, v. THOMAS WILLETTS. [*709**
April 19.

A testator, having four sons, A., B., C., and D., devised to his sons B., C., and D., "all those my five freehold messuages, tenements, dwelling-houses, and premises, with their appurtenances, at R., in the occupation of J. P. or his under-tenants, to hold to them, their heirs and assigns for ever, as tenants in common." The property in the occupation of J. P. at the time of the making of the will, and of the testator's death, consisted of five cottages and about three acres of meadow land adjoining:—Held, that the *lund* passed to B., C., and D., as well as the cottages.

A certified copy, under the seal of the insolvent debtors' court, of the assignment from the provisional assignee, is, under the 7 G. 4, c. 57, s. 19, evidence of such assignment, without proof of any petition having been filed by the insolvent, or of any appointment of an assignee.

THIS was an action of ejectment brought to recover an undivided third part of three acres of land at Rowley Regis, in the county of Stafford.

The cause was tried before COLTMAN, J., at the last spring assizes at Stafford. The facts were as follows: One William Willetts, who died in 1829, leaving four sons,—John, Joseph, William, and Thomas,—was, at the time of his death, seised of five freehold cottages, with three acres of land adjoining, upon which was a stable. By his will, he devised to the three younger sons, from and after the death of his widow, "all those my freehold messuages, tenements, and premises, with their appurtenances, at Rowley Regis, in the county of Stafford, in the occupation of James Priest, his under-tenant or under-tenants; to hold to them, their heirs and assigns for ever, as tenants in common:" and he appointed his eldest son, John, his executor.

At the date of the will, and at the time of the testator's death, Priest was tenant of the three acres of land and stable, as well as of the five cottages. No part of the land had ever been held by any occupier of any of the cottages.

*The widow of the testator died in 1834; and, in the same year, [*710 Joseph Willetts, who had been taken in execution for a debt, petitioned for his discharge under the insolvent debtors' act then in force—7 G. 4, c. 57. The lessor of the plaintiff claimed, as his assignee, one-third of the land, which had been in the possession of the defendant ever since his mother's death.

In order to prove his title as assignee, the lessor of the plaintiff put in the assignment from Joseph Willetts, the insolvent, to Sturges, the provisional assignee of the insolvent court, and a document which purported to be a copy under the seal of the court, of an order to the provisional assignee to convey the insolvent's estate to the lessor of the plaintiff, and of an assignment made thereon. This latter copy, it was insisted on the part of the defendant, was inadmissible; but the learned judge received it.

It was then objected, that there was no proof of any petition filed by Joseph Willetts, or of any appointment of an assignee; and it was fur-

ther objected that the land in question did not pass by the will of William Willetts as appurtenant to the cottages.

The learned judge was of opinion that the land did pass by the will; and he directed the jury to find for the plaintiff,—reserving to the defendant leave to move to enter a nonsuit.

Allen, Serjt., now moved accordingly. 1. The copy of the order of the insolvent court was improperly received, without proof of the proceedings in the ordinary way. This case depends upon the 7 G. 4, c. 57, which contains no provisions analogous to the 105th section of the 1 & 2 Vict. c. 110. (a) [V. WILLIAMS, J. *The 76th section of *711] the 7 G. 4, c. 57, provided that “a copy of such petition, schedule, order, and other orders and proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, schedule, order, or other proceeding, and sealed with the seal of the said court, shall at all times be admitted in all courts whatever, and before commissioners of bankrupt and justices of the peace, as sufficient evidence of the same, without any proof whatever given of the same, further than that the same is sealed with the seal of the said court as aforesaid.”] Under that statute, it was imperative on the party to show that it was the seal of the court. [CRESSWELL, J. The objection seems to be removed by the 8 & 9 Vict. c. 113, the 1st section of which,—reciting that “whereas it is provided by many statutes, that various certificates, official and public documents, documents and proceedings of corporations and of joint-stock and other companies, and certified copies of documents, by-laws, entries in registers and other books, shall be receivable in evidence of certain particulars, in courts of justice, provided they be respectively authenticated in the manner prescribed by such statutes; and whereas the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine; and it is expedient to facilitate the admission in evidence of such *712] and the like documents,”—enacts, “that, whenever by *any act now in force, or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding,—the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed

(a) Which enacts, “that a copy of such petition, vesting order, schedule, order of adjudication, and other orders and proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, vesting order, schedule, order of adjudication, or other proceeding, and purporting to be sealed with the seal of the said court, shall, at all times, be admitted, in all courts and places whatever, as sufficient evidence of the same, without any other proof whatever given of the same.”

alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence." Here, the original record would clearly have been evidence: and this statute puts the copy in the same situation as the original.] That statute certainly seems to answer the first objection.

2. The document put in, and, as it now seems, properly admitted, was, an assignment from the provisional assignee to the lessor of the plaintiff: but there was no proof of any petition filed by Joseph Willetts, or of any proceedings thereon. The 11th section of the 7 G. 4, c. 57, provides that the insolvent shall, at the time of filing his petition, execute an assignment to the provisional assignee of all his estate and effects: and the 19th section provides for the appointment of other assignees, and for the assignment of the estate by the provisional assignee to them; and enacts "that every such conveyance and assignment as aforesaid to such provisional assignee, and a counterpart of every [713 such conveyance and assignment by such provisional assignee to such other assignee or assignees, shall be filed of record in the said court; and a copy of any such record, made upon parchment, and purporting to have the certificate of the provisional assignee of the said court, or his deputy, appointed for that purpose, endorsed thereon, and to be sealed with the seal of the said court, shall be recognised and received as sufficient evidence of such conveyance and assignment, and of the title of the provisional and other assignee or assignees under the same, in all courts, and before commissioners of bankrupt and justices of the peace, to all intents and purposes, without any proof whatever given of the same, or of any other proceeding in the said court in the matter of such prisoner's petition." The question here is, whether the copy of the assignment shall be taken to be evidence that all had been done to constitute a legal title. [WILDE, C. J. It would be idle to say that a copy shall be evidence, if all the previous steps are still required to be proved. The very object of the act was to dispense with all such formal proof. CRESSWELL, J., referred to *Jackson v. Thompson*, 2 Q. B. 887.]

3. The terms of the will were not sufficient to carry the land in question. [WILDE, C. J. Suppose you strike out the words "five freehold messuages and tenements," leaving it—"all those my premises, with their appurtenances, at Rowley Regis, in the occupation of James Priest,"—would not that pass the land, which was in the occupation of Priest? Is the effect of the word "premises" circumscribed by the previous words?] It is submitted that it is. There are many cases which show that land will not pass by the word "appurtenances." *Hearn v. Allen*,

*714] Cro. Car. 57; Roe *d.* Walker **v.* Walker, 3 Bos. & Pull. 375. [V. WILLIAMS, J. There are cases both ways.(a) The learned judge, at the trial, relied on the word "premises," which clearly would not pass this land.(b) [WILDE, C. J. "Tenement and premises" would undoubtedly pass the land.] This is a question of intention. It cannot be supposed that the testator intended to disinherit his heir. [WILDE, C. J. He certainly had not forgotten him; for, he appoints him his executor. The eldest son was probably otherwise provided for. Why is it to be assumed that the testator meant to die intestate as to any part of the premises in the occupation of Priest?]

WILDE, C. J. I cannot see any reasonable ground for doubt in this case. Taking the most general description of the property, I think it is clear that the testator intended that the whole should pass by his will. It appears that the land in question was contiguous to the five cottages, and that the whole was enclosed in a ring-fence. The words of the devise are—"All those my five freehold messuages, tenements, and premises, with their appurtenances, at Rowley Regis, in the county of Stafford, in the occupation of James Priest, his under-tenant or under-tenants; to hold to them, their heirs, and assigns, for ever, as tenants in common." In construing this devise, it is not necessary to resort to the word "appurtenances." The other words are abundant, and more apt, to show what the testator intended. He has taken pains to exclude the possibility of doubt, by describing the subject-matter as "in the occupation of James Priest, his under-tenant or under-tenants." The land, as well as the five cottages, was in the occupation of Priest: there is, there-
*715] fore, abundantly sufficient to *pass the whole, not by implication merely, but by the very words of the will. The word "premises," is commonly used as comprising land and houses and other matters. Either "tenements" or "premises" would be sufficient to include the land. Taking, it, however, in conjunction with the words descriptive of the occupation, the case is perfectly clear and free from doubt.

The other grounds of motion having been disposed of during the argument, there will be no rule.

COLTMAN, J. There is no ground for saying that this is disinheriting the heir by implication: he is disinherited by the clear and unambiguous terms of the will.

CRESWELL, J., concurred.

V. WILLIAMS, J. In Doe *d.* Norton *v.* Webster, 12 Ad. & E. 442,—where almost all the cases are referred to,—the words "a messuage or tenement formerly used as a workhouse, in the occupation of W., with the appurtenances," in a deed, were held sufficient to pass land which had always been occupied by the master of the workhouse. The words here are very much stronger.

RULE refused.

***SAINTER v. FERGUSON. April 18.**

[*716]

A. and B. entered into the following agreement :—" In consideration that A., of Macclesfield, surgeon and apothecary, will engage me, the undersigned B., as assistant to him as a surgeon, &c., I, the said B., promise the said A. that I will not *at any time* practise as surgeon or apothecary at Macclesfield, or within seven miles thereof, under a penalty of 500*l.*: and I, the said A., do hereby agree with the said B., to engage the said B. as an assistant to me as a surgeon, &c., on the terms aforesaid."

In assumpsit by A. against B. for a breach of this agreement, the declaration averred that A. did, in pursuance and performance of the agreement, engage B. as assistant to him A. as a surgeon, &c., according to the terms, true intent, and meaning of the agreement :—

Held that there was a sufficient consideration for the promise of B., and that the contract was not void as an unreasonable restraint of trade.

Held also, that the 500*l.* was not a penalty, but liquidated damages.

THIS was an action of assumpsit. The declaration stated that, on the 12th of April, 1848, a certain agreement in writing was made and entered into between the plaintiff of the one part and the defendant of the other part, which said agreement was and is in the words and figures following :—" In consideration that Joseph Denby Sainter, of Macclesfield, surgeon and apothecary, will engage me, the undersigned William Edward Ferguson, as assistant to him as a surgeon and apothecary, I the said William Edward Ferguson, promise the said Joseph Denby Sainter that I will not *at any time* practise, in my own name, or in the name or names of any other person or persons, as a surgeon or apothecary, at Macclesfield, or within seven miles thereof, under a penalty of 500*l.*: and I, the said Joseph Denby Sainter, do hereby agree with the said William Edward Ferguson to engage the said William Edward Ferguson as an assistant to me as surgeon and apothecary, on the terms aforesaid,"—which said agreement was duly signed and subscribed by the said William Edward Ferguson and Joseph Denby Sainter, parties thereto. Averment, that the said William Edward *Ferguson [*717 in the said agreement mentioned, and whose name was subscribed thereto, was and is the defendant, and that the said Joseph Denby Sainter, therein also mentioned, was and is the plaintiff: Mutual promises: Averment, that the plaintiff did, to wit, on, &c., in pursuance and performance of the said agreement, engage the defendant as assistant to him, the plaintiff, as surgeon and apothecary, according to the terms, true intent, and meaning of the said agreement; and that the plaintiff had been at all times in all things ready and willing to observe and perform his part of the said agreement,—whereof the defendant had continually had notice: yet that the defendant, after the making of the agreement, to wit, on, &c., and from thence continually up to the commencement of the suit, did, and still continued to practise in his own name as a surgeon and apothecary, at Macclesfield, in the said agreement mentioned, although the defendant had not, at any time before the commencement of the suit, in any manner paid or satisfied the said

penalty of 500*l.* in the said agreement mentioned, or any part thereof, contrary to his, the defendant's, said agreement and promise.

The defendant pleaded,—first, non assumpsit,—secondly, that the plaintiff did not engage the defendant,—thirdly, that the plaintiff was not a surgeon,—fourthly, that the agreement was made and entered into by the fraud and misrepresentation of the plaintiff,—fifthly, discharge from performance, before breach,—sixthly, that the defendant did not practise in his own name at Macclesfield,—seventhly, leave and license.

The cause was tried before CRESSWELL, J., at the last spring assizes at Chester. On the part of the defendant, it was objected that the agreement was void, as an unreasonable restraint of trade, inasmuch as it professed to bind the defendant not to practise, *at any time*, as a surgeon *718] and apothecary at Macclesfield, or within seven *miles thereof; and that the 500*l.* was in the nature of a penalty merely, and not liquidated damages.

Under the direction of the learned judge, the jury found for the plaintiff, damages 500*l.*, the points being reserved.

Channell, Serjt., accordingly, now moved to enter a nonsuit, or for a new trial on the ground of misdirection, or to arrest the judgment. The fair meaning of the contract is, that the defendant shall not practise as a surgeon and apothecary at or within the prescribed distance from Macclesfield so long as he shall remain in the service of the plaintiff. [WILDE, C. J. The words are plainly sufficient to restrain the defendant from practising at any time,—even after the plaintiff had ceased to practise as a surgeon and apothecary at Macclesfield, or, perhaps, after the plaintiff had ceased to exist: and the authorities show that such a contract would not be objectionable.]

Then the contract is void, as creating an unreasonable restraint of trade, and being without consideration, and without mutuality. There is no obligation on the plaintiff's part, to employ the defendant. To sustain a contract of this description, the restraint must be *partial* and there must be a *reasonable* consideration: notes to *Mitchel v. Reynolds*, 1 P. Wms. 181, 1 Smith's Leading Cases, 182: although the courts will not now inquire into the *adequacy* of the consideration: *Hitchcock v. Coker*, 6 Ad. & E. 438, 1 N. & P. 796. Here, it is submitted there is *no* consideration. If there had been an agreement on the plaintiff's part, to employ the defendant as his assistant for any specified time, or for a reasonable time, or for so long as he should conduct himself properly, or even at a yearly salary, *719] the consideration would have been *sufficient. This contract, however, is altogether defective in this respect: the plaintiff was at liberty to dismiss the defendant at any moment. *Young v. Timmins*, 1 Tyrwh. 226, 1 C. & J. 331,—apart from the question of adequacy of consideration,—is in point. By an agreement, reciting that the defendants had for some time past employed, and then did employ George Ireland, in executing the orders which they from time to time received

for brass foundry, and also reciting that the defendants had requested Ireland to enter into an agreement to work in his trade or business, and to execute the orders of the defendants, in manufacturing goods in the way of his trade for the defendants alone, to which he had consented, in consideration of his past employment, and also of the defendants' undertaking to continue to employ him *as theretofore*,—the defendants agreed with Ireland that they would, during the joint lives of themselves and Ireland, continue to employ him in executing their orders *as theretofore*, and upon the like or other usual terms, subject, nevertheless, to the provisos and agreements thereafter mentioned; and Ireland agreed with the defendants that he would, during the joint lives of the defendants, work for, and execute their orders for, them as he had been accustomed, in his trade or business, in a good and workmanlike manner, and at general and proper prices or terms; and that he would not, *at any time*, work for, or execute or cause to be executed the orders of, any person or persons whatsoever, in his trade or business, without the consent in writing of the defendants, which consent should be necessary upon every distinct occasion, and should contain the address of the person or persons for whom he might thereby be permitted to be employed, and also the specific work which he was thereby permitted to perform: but it *was* provided and agreed, that, in case the defendants should, [*720 at any time, be desirous to put an end to that agreement, and should give, or cause to be given, at least three months' notice in writing to Ireland, the agreement should be considered as at an end and determined: provided also, that, in case the defendants should at any time have occasion, or be under the necessity, by reason of the urgency or extent of orders, or *should otherwise think fit*, they should be at liberty to employ any other person or persons to execute orders for them in the trade or business of Ireland; and that without thereby releasing Ireland from his agreement therein contained of exclusively working for the defendants; and it was provided that nothing therein contained should be taken to restrain or prevent Ireland from executing the orders of any person or persons residing in the city of London, or within six miles thereof. The agreement was held void for *inadequacy* of consideration. BAYLEY, B., there said; "The restraint in this case, from the nature of the business carried on, was a restraint, not only of the party's own exertions in trade, but of the numerous workmen whom a tradesman of this description must necessarily employ. The restraint is prejudicial to the individual restrained, and to the rights of the public; for, every man has a right to the fruits of his own unrestricted exertions, and the public have a right to the benefit which they may derive from such exertions. We are, therefore, to see whether there is any adequate consideration for the restraint in question. The bankrupt was restrained from working for any person other than the defendants, except in London, or by their permission, and they are at liberty to judge whether

they will grant such permission or not. Now, is there any reasonable consideration for Ireland's being restrained in this manner? If I could *721] find in this agreement any obligation on the *part of the defendants to furnish Ireland with an adequate quantity of work, I should say that there was an adequate consideration; but, if there is nothing in this agreement to oblige them to furnish an adequate quantity of work, and especially if it appear probable, from the nature of the instrument, that it may happen that Ireland might be left without sufficient employment by the defendants, then the consideration in this case fails. It was well put, on the part of the plaintiffs, that the proper test for trying the present question, is, by considering whether Ireland, not having sufficient employment from the defendants, could maintain an action against them for not furnishing him with work. If he *could* maintain such action, I should think that there was an adequate consideration for this restraint: if he could *not*, I should think the consideration not adequate. It appears from the recital, that Ireland was employed to execute the orders which the defendants received for brass-foundry, and he agrees to manufacture for them alone. It manifestly appears that the bankrupt's employment was to depend upon the orders which the Messrs. Timmins should from time to time receive. If *they* received no orders, how was *he* to be employed? He could solicit no orders in his own neighbourhood, without the defendants' consent; which they were at liberty to withhold. But the defendants do not stipulate that they are to employ the bankrupt on all the orders which they receive: for, *they* are to be at large; they are at liberty to employ any other person or persons, *by reason of the urgency or extent of orders*, or if they *should otherwise think fit*. Even the liberty to employ others might greatly interfere with Ireland's employment; for, if they received orders which would have kept him in employment for a month, by such orders being distributed to him and others, he might only be employed *722] for a few days. But, *further, the defendants are to be at liberty, not only *if occasion should require*, but *if they should otherwise think fit*: so that their liberty is not confined to an urgency of orders, but is to be exercised as they think fit. Suppose the defendants had found some other workman, and had thought fit to withdraw their work from Ireland, and give it to the other workman, what a situation Ireland would have been in. If Ireland were out of employment for six months, could he have maintained any action? The first answer would have been—we have had no orders to be executed. The second answer might be, we have employed other persons, as we thought fit. There is certainly the expression 'as heretofore;' but, at all events, the extent of the employment was confined of necessity to the orders to be received by the defendants; and I am therefore of opinion that this is a partial restraint of trade, but that there is no adequate consideration." [CRESSWELL, J., referred to *Johnston v. Nicholls*, 1 Man. Gr. & S. 251. No

doubt, it is well decided, in the case of guarantees, that the adequacy of the consideration, so that the supply be not merely colourable, will not be inquired into. *V. WILLIAMS, J.* How would it be, in the case of a guarantee for the good behaviour of a clerk? *WILDE, C. J.* The liability of the party would only be co-extensive with the clerk's employment: there, there would be full consideration.] In all the cases, it will be found that there has been an engagement for a stipulated time, or for a reasonable time. [*V. WILLIAMS, J.* In *Nicholls v. Stretton*, 7 Beavan, 42, A., on being articulated to B., covenanted not to be concerned for any of B's clients, and forfeited 100*l.* for any such breach. A., after being admitted, acted in contravention of this *covenant: and he was restrained by injunction.(a) *WILDE, C.* [*723 *J.* A general hiring is a hiring for a year, according to the case of *Beeston v. Collyer*, 4 Bingh. 309, 12 J. B. Moore, 552.] Could the defendant have maintained an action against the plaintiff for dismissing him before the end of the year? [*CRESSWELL, J.* No: and for this reason: the agreement does not import an engagement at all; the proposed engagement was to be something *dehors*.] This may be likened to the case of a promise by an executor to pay the debt of his testator, which, according to the *dictum* of Lord *HARDWICKE* in *Reech v. Kenne-gal*, 1 Ves. 126, will not personally bind the executor, unless some consideration be alleged—as, of assets come to his hands, or of forbearance. And in the notes to *Forth v. Stanton*, 1 Wms. Saund. 210 c, n. (c), it is said, that, “in all cases of forbearance to sue, such forbearance must be either *absolute.(b) or for a definite time.(c) or for a reasonable [*724 time:(d) forbearance for a little,(e) or for *some* time,(g) is not sufficient.” In *Pilkington v. Scott*, 15 M. & W. 657, and *Hartley v. Cummings*, 5 Man., Gr. & S. 247, the agreements were held good, because the court could, on the face of them, collect an engagement on the part of the employers to employ the workmen. [*WILDE, C. J.* Is

(a) The deed in that case was never executed by the plaintiff, and it was therefore contended that there was no mutuality. It was also provided that the plaintiff should not be obliged to continue the defendant in his service against his will, during the whole or any part of the five years, but that the defendant should at any time quit the plaintiff's service, on receiving a week's notice so to do. Lord *LANGDALE, M. R.*, said: “In all cases of this kind, where an injunction is asked to restrain a party from exercising his professional employment, the court has always had some reluctance in acting; for, not only is it, to some extent, a restriction on trade, but it may also have the effect of depriving third parties of the services of those in whom alone they may have confidence. The question has arisen not only in cases of solicitors, but in that of medical men. There was a case before Lord *ELDON*, of a medical man who had covenanted not to be employed for certain persons, and, those persons being taken ill, it was a case of great hardship to say that he should not attend them. It must be admitted that this court cannot interfere in these cases, without the possibility of injury to third parties. That difficulty, however, has been passed over, and the court has repeatedly exercised its jurisdiction in cases of this nature.”

(b) Citing *Mapes v. Sidney*, Cro. Jac. 683. (c) Citing *Fisher v. Richardson*, Cro. Jac. 47.

(d) Citing *Johnson v. Whitcott*, 1 Roll. Abr. 24, pl. 33.; translated 1 Vin. Abr. 311. And see *Payne v. Wilson*, 7 B. & C. 423, 1 M. & R. 708.

(e) Citing *Brooke v. Dowse*, 1 Roll. Abr. 23, pl. 25; translated 1 Vin. Abr. 308.

(g) Citing *Tilston v. Clarke*, 1 Roll. Abr. 23, pl. 26; translated 1 Vin. Abr. 308.

there not an undertaking to engage the defendant for a reasonable time, imported into this contract?] It is submitted that there is not: if it were, it would equally be so in the case of a forbearance to sue. Besides, the declaration here does not allege an engagement for a reasonable time. [COLTMAN, J. Were the cases as to forbearance for some time or a little time, cases after verdict?] Fisher v. Richardson came before the court on demurrer to the declaration; Johnson v. Whitchott, on demurrer to a plea by the executor that he had no assets at the time of the making of the promise; Brooke v. Dowse and Tilston v. Clarke came before the court on writ of error; (a) and Mapes v. Sidney was a motion in arrest of judgment. [CRESSWELL, J. The agreement declared on is silent as to the terms or the duration of the engagement that is contemplated: there is no specific amount of salary agreed upon; nor does it appear whether the engagement is to be for a week or a year. The declaration avers that the plaintiff did engage the defendant, in pursuance of and *725] according to the terms of the *agreement,—that means, upon terms mutually agreed upon between them.] For how long? [CRESSWELL, J. For so long as they should mutually agree. Would a *bond fide* engagement for an hour suffice?] It might. [V. WILLIAMS, J. It lies upon the plaintiff, who seeks to enforce the agreement, to show that it is not an unreasonable restraint of trade.]

The learned judge miscarried in telling the jury that the 500*l.* might be treated as liquidated damages, and not as a penalty. It is not unimportant to observe that the agreement itself uses the latter word only. This is not, therefore, like the case of Galsworthy v. Strutt, 15 M. & W. 659. In Crisdee v. Bolton, 3 C. & P. 240, BEST, C. J., in a similar case to this, left it to the jury to say what was the actual damage sustained by the defendant's breach of contract.

WILDE, C. J. Where there is any reasonable ground for doubt, the party ought to have a rule to show cause; but it is equally important not to introduce uncertainty by granting a rule, where there ought to be no doubt. It appears to me that this case falls within the latter predicament. The first question is, whether the agreement here was made upon a good consideration. In order to determine this question, it is material to attend minutely to the terms of the contract, which is as follows:—“In consideration that J. D. Sainter, of Macclesfield, surgeon and apothecary, will engage me, the undersigned W. E. Ferguson, as assistant to him as surgeon and apothecary, I, the said W. E. Ferguson, promise the said J. D. Sainter that I will not, at any time, practise, in my own name, or the names of any other person or persons, as surgeon or apothecary, at Macclesfield, or within seven miles thereof, under a penalty *726] of 500*l.* And I, the said J. D. Sainter, do *hereby agree with the said W. E. Ferguson, to engage the said W. E. Ferguson,

(a) And after verdict, according to the report in Cro. Car. 438: as was also the case in Brooke (or Cook) v. Dowse, *supra* n. (d), and Cro. Car. 241.

as an assistant to me as a surgeon and apothecary, on the terms afore said."

In consideration that the plaintiff will engage the defendant as an assistant, the latter promises not to practise in Macclesfield or the neighbourhood; and the plaintiff binds himself to engage the defendant as such assistant. What are we to understand from that? It would seem that the parties were not prepared, at the date of the contract, to fix the period or the terms of the engagement, but left that to be matter for future discussion. The stipulation for the restriction of the defendant's practising at Macclesfield, or within the prescribed limit, was to have effect only when the subsequent definitive engagement should have been entered into. Supposing the plaintiff to be a person of skill and reputation, the very fact of his engaging the defendant as his assistant, would give the latter a great advantage as a rival; inasmuch as his being so authenticated, would naturally give him an opportunity of worming himself into his employer's connexion. An engagement, therefore, even for a short time, would be advantageous to the defendant, and detrimental to the plaintiff. But we must suppose that the parties contemplated an engagement reasonable in point of time and other circumstances. It may fairly be assumed that an offer of an engagement which was merely illusory, would be rejected by the defendant: and in that case he would not be subjected to the proposed restriction. He therefore would have the means of protecting himself. The plaintiff contracts to enter into a reasonable engagement with the defendant; that is, in effect, to offer such reasonable terms as the defendant would be bound to accept. Looking at the contract, therefore, as importing an engagement which will have the defendant's assent, and the declaration alleging that the plaintiff did, in pursuance of the agreement, engage the defendant as assistant, I think it *discloses a sufficient consideration. Consequently, the [*727 first objection fails.

The next question is, whether the 500*l.* mentioned in the agreement is to be considered as liquidated damages or not. That is a question which has sometimes been left to the jury. That course was adopted by BEST, C. J., in *Crisdee v. Bolton*, 3 C. & P. 240. But it is now clearly settled, that, whether the sum mentioned in an agreement to be paid for a breach, is to be treated as a penalty or as liquidated and ascertained damages, is a question of law, to be decided by the judge upon a consideration of the whole instrument. This agreement does not prohibit the defendant's doing several distinct and independent acts, each of which might be incapable of exact estimation: nor does it involve any of the circumstances that have, in any of the cases, induced the court to hold the sum to be a penalty only. The whole object of the plaintiff was, to protect himself from a rival; and it would be impossible in such a case to say precisely what damage might result to him from a breach of the agreement: it is not unreasonable, therefore, that the parties should themselves fix and ascertain the sum that should be paid. And J

think we can only give effect to the contract of the parties, by holding the 500*l.* to be liquidated damages, and not a mere penalty, and, consequently, that there ought to be no rule.

COLTMAN, J. As the law formerly stood, this declaration would have been bad; for, if the adequacy of the consideration were a matter to be looked at, it would be impossible to ascertain that without knowing the terms of the engagement. It is now, however, settled that the court *728] will not inquire into the adequacy *of the consideration. That being so, all that is necessary is, to see whether there is *any* consideration on the face of the declaration. I must confess I was somewhat struck by the authorities referred to by my brother *Channell*, where forbearance of a debt for "some" or "a little" time, was held insufficient. But, in those cases, the court could evidently see that there was no contract for forbearance at all: whereas, here, the declaration distinctly avers that the plaintiff did, in pursuance and performance of the agreement, engage the defendant as his assistant, according to the terms, true intent, and meaning of the agreement. That being pleaded over to, sufficiently imports that a definite engagement was entered into between the parties. That being so, it seems to me that there is nothing unreasonable in the restriction, and that there is a sufficient statement of consideration.

As to the second point, I agree with the lord chief justice, that, although the word "penalty," which would *prima facie* exclude the notion of stipulated damages, is used here, yet we must look at the nature of the agreement, and the surrounding circumstances, to see whether the parties intended the sum mentioned to be a penalty or stipulated damages. Considering the nature of this agreement, and the difficulty the plaintiff would be under in showing what specific damage he had sustained from the defendant's breach of it, I think we can only reasonably construe it to be a contract for stipulated and ascertained damages.

CRESSWELL, J. I am of the same opinion. I think now, as I thought at the trial, that the agreement contemplated that the defendant should be restrained from practising at or within seven miles of Macclesfield, not only during the time he might be acting as assistant to the plaintiff, *729] but at *any* time; and that the contract is *free from the objection urged against it. The terms are,—“in consideration that Sainter will (thereafter) engage me, Ferguson, as assistant to him as a surgeon and apothecary, I promise him that I will not *at any time* practise, in my own name, or in the name or names of any other person or persons, as surgeon or apothecary at Macclesfield or within seven miles thereof, under a penalty of 500*l.* And I, Sainter, do hereby agree with Ferguson to engage him as an assistant to me as a surgeon and apothecary, on the terms aforesaid.” If the plaintiff did not engage the defendant, the latter was not restrained; if he did, then he *was* restrained. The declaration avers that the plaintiff did engage the defendant, that is, did

contract with him to employ him as his assistant. The cases cited as to forbearance of a debt, proceeded upon the footing that there was no agreement. Here, there was a contract founded upon some consideration: its adequacy is not in question: *Hitchcock v. Coker*. It would be singular, indeed, if such an inquiry could be entered into. The question, then, is, was it reasonable that the defendant should be restrained? As between the parties, it was undoubtedly reasonable that they should be mutually bound by their contract. Then, is it reasonable as far as the public is concerned? It has been held, in many cases, that a contract restraining a party from carrying on a particular business, at a given place, or within a given district, is valid. In *Ward v. Byrne*, 5 M. & W. 548, 561, PARKE, B., says: "A restraint prohibiting a party from carrying on trade within certain limits of *space* would be good, and a contract entered into for the purpose of enforcing such an agreement as that would be valid; and the limit of the space is that which, according to the trade he carries on, is necessary for the protection of the party with *whom the contract is made." In the case of a cow-keeper a limit of five miles from a certain spot was held not unreasonable: [*730 *Proctor v. Sargent*, 2 M. & G. 31, 2 Scott, N. R. 289. In *Mallan v. May*, 11 M. & W. 658, a stipulation that the defendant should not practise as a dentist in London, was held not an unreasonable restraint. So, here, I think the prohibition to practise in Macclesfield, or within seven miles thereof, is not, with reference to the public at large, an unreasonable protection to the plaintiff.

With respect to the damages, I concur in what has fallen from the lord chief justice and my brother COLTMAN. If there be only one event upon which the money was to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from a breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation, in order to avoid the difficulty.

V. WILLIAMS, J. I am of the same opinion. It seems clear that the contract is not confined to a restraint *durante servitio*. And I think there was a sufficient legal consideration. Since the case of *Hitchcock v. Coker*, it has been uniformly held that the court will not inquire into the extent or the adequacy of the consideration for a contract of this sort. *Prima facie*, all restraints of trade are bad. But, if the restraint is such as not to be unreasonable as between the parties, or injurious to the public, the rule does not apply. In cases like this, the restraint has been regarded rather as a necessary security for the employer, provided it be not larger than his protection reasonably requires.

As to the last point, I agree with the rest of the court, that it is competent to the parties by mutual *agreement to settle the amount of damages that are in their nature uncertain and difficult of estimation, where they depend upon the failure to perform a single act.

Rule refused.

FRANCIS, a Pauper, v. WEBB. *April 16.*

The court will not interfere, even in the case of a plaintiff suing *in forma pauperis*, to prevent effect being given to a settlement between the parties,—although it be evident that the attorney will lose his costs,—unless the settlement be clearly collusive.

ASSUMPSIT, for a balance of 172*l.*, due upon a building contract, and for work and labour. Pending the cause, (a) the plaintiff obtained leave to prosecute the action *in forma pauperis*. Subsequently, the parties agreed to refer the matters in difference to two surveyors. The arbitrators allowed the time for making their award to elapse, and no leave was obtained to enlarge it. On the 1st of January, 1849, the plaintiff's attorney gave the defendant's attorney notice of trial for the first sitting in the next term. On the 3d, the defendant, as he swore,—“in consequence of the plaintiff's prosecuting the action *in forma pauperis*, and being well assured that he was not indebted to the plaintiff, but in order to save the heavy expenses attendant on the further prosecution of the reference, entered into a negotiation with the plaintiff to pay him 100*l.*” which sum he paid to the plaintiff on the following day, taking from him a receipt in full of all demands. On the 4th, the plaintiff's attorney gave a note to the defendant and also to his attorney, as follows:—“I hereby give you notice that I have a lien on the debt in this action, for *732] costs; and you are hereby required not to settle or *compromise this action with the plaintiff, without my written consent. And I further give you notice, that, if you do so compromise this action in any way with the plaintiff, or any other person than myself in this behalf, until my lien aforesaid has been first paid, I shall hold you liable to pay over again the amount thereof to me.” On the 9th, the defendant's attorney gave the plaintiff notice that the action had been settled, and required him to withdraw the notice of trial. On the 12th, a notice to produce and to inspect and admit certain documents in the cause, was served upon the defendant's attorney. And on the 19th, a judge's order was obtained by the plaintiff's attorney, making the cause a remanet to the second sitting. On the 20th, an order was made by COLTMAN, J., to produce certain documents in the custody or power of the defendant, to be stamped, the plaintiff's attorney undertaking to pay the costs of that application. On the 22d, the defendant's attorney delivered a bill of costs, with an appointment to tax endorsed thereon. On the 25th,

Archbold, for the defendant, obtained a rule nisi to set aside the judge's order, and for a stay of proceedings, for irregularity.

This rule was afterwards enlarged until the first day of Easter term, on the usual conditions.

(a) As to leave to proceed *in forma pauperis* obtained *pendente lite*, see *Bland v. Lamb*, 2 Jac. & W. 402, *Brant v. Wardle*, 3 M. & G. 534, 4 Scott, N. R. 188, 9 Dowl. N. S. 229; *Doe d. Ellis v. Owens*, 9 M. & W. 455, 1 Dowl. N. S. 404; *Hall v. Ives*, 7 M. & G. 1001, 8 Scott, N. R. 715, 3 D. & L. 610.

Parry and *Metcalf* now appeared to show cause, when,

Byles, Serjt., objected that the affidavits to be used in opposition to the rule had not been filed a week before the term, as required by the practice of the court.(a)

**Parry* produced an affidavit to explain the reason of the omission. It appeared that the attorney's clerk went to the office for the purpose of filing the affidavits, on Thursday the 5th of April, but found it closed for the Easter holidays, and consequently he was unable to file them until the following Wednesday. It was submitted, that, as the defendant could not, if the affidavits had been duly filed, have obtained copies of them until after the holidays, he had sustained no injury, and the case might fairly be held to fall within *Hoare v. Hill*, 1 Chitt. Rep. 27, and *re James Mackay*, 1 D. & L. 206, in the former of which it was held that affidavits might be read, though, by accident, not filed in due time; and, in the latter, that the party was estopped from taking such an objection, where he had obtained office copies of the affidavits. [WILDE, C. J. The rule was distinctly laid down in *Turner v. Unwin*, 4 Dowl. P. C. 16, that nothing will excuse the omission to file the affidavits pursuant to the rule, but some inevitable accident; as was the case in *Mackay*, *ex parte*. The provision as to filing affidavits a week before the term is a bargain between the parties, which the court ought not to interfere with.] [*733]

Byles, Serjt., proposed, and *Parry* agreed, that the affidavits should be read, it being understood that the defendant should not be charged with the expense of them in the event of the rule being discharged.

Parry and *Metcalf* accordingly proceeded to show cause. They submitted, that the affidavits,—which stated, that, about the time of the settlement of the action, the plaintiff and defendant were seen drinking and going about together to places of amusement, and that the plaintiff had been heard to use expressions *indicative of an intention on his part to defraud his attorney; saying, in answer to an inquiry as to whether he had settled with his attorney, “No. Mr. Webb and I have made that all right; and the lawyers may go to hell,”—clearly established a case of fraudulent collusion between the parties to cheat the plaintiff's attorney of his costs; and that the application was too late. [*734]

Byles, Serjt., and *Archbold*, in support of the rule. In *Lush's Practice*,(b) it is said: “It is well settled, that, if the opposite party pay money to the client after notice from the attorney that his costs are unpaid, and that he looks to the proceeds of the action for payment, the court will on motion compel him to pay those costs. It is like paying a debt which has been assigned, after notice. Whether the party has paid a smaller sum by way of compromise, or whether he has paid the whole demand, costs included, seems upon the general question immaterial. It

(a) See 6 Scott, 900.

(b) Page 235.

is the fact of notice which creates the right. *Independently of this the party has a right to pay the amount due from him to his opponent, and the latter is bound to receive it.*"(a) In *Jordan v. Hunt*, 3 Dowl. P. C. 666, PARKE, B., says: "It is quite competent to parties to settle actions behind the backs of the attorneys, for it is the client's action and not the attorney's. It must be shown affirmatively that the settlement was effected with the view of cheating the attorney of his costs." The rule is similarly laid down in Archbold's Practice,(b) and in Archbold's Practice of Attorneys.(c) And in Mr. Broom's more recent work,(d) the subject is thus treated: "A party is, notwithstanding the attorney's lien *735] on the judgment, when recovered, always *at liberty to compromise the action in his absence, provided this be not done with a view to deprive the plaintiff's attorney of his costs, and with a fraudulent intent on the part of the client;(e) and the defendant's attorney has no such interest in the suit as will enable him to prevent a compromise.(g) Where, moreover, the action is for damages purely unliquidated, and there has been no surprise or misrepresentation in the case, the court will not, it seems, interfere in behalf of the plaintiff's attorney, although notice has been given to the defendant by the plaintiff's attorney not to settle or compromise the action without his consent.(h) Further, an attorney is not justified in proceeding with an action after it has been settled between the parties, though it is known that costs have been incurred, and that the plaintiff himself is not in a condition to pay them; but it must be shown, affirmatively, that the settlement was come to for the purpose of cheating the attorney.(i) For instance, the plaintiff and defendant having settled an action, after verdict for the plaintiff, without the knowledge of the plaintiff's attorney, the defendant gave notice of the compromise to the attorney, who afterwards signed final judgment. The court, upon affidavits denying any conspiracy to defraud the attorney of his costs, made a rule absolute to set aside the judgment."(k) [WILDE, C. J. The principal difficulty in your way is this: here is an action brought to recover 172*l.*, the balance of a builder's account amounting to 1646*l.* 11*s.* 9*d.*: the plaintiff is suing *in forma pauperis*: the *736] defendant is told that the compromise is *a fraudulent one; and yet, when he comes to the court to stay the proceedings, his affidavit does not state that the settlement was made *bona fide*, and not with a view to cheat the plaintiff's attorney of his costs.] It is for the attorney to show collusion and fraud. Of this there is no evidence whatever to affect the defendant. The defendant did what he had an undoubted

(a) Anon. 1 Dowl. P. C. 173.

(b) 8th edit. by Chitty, Vol. 1, p. 108.

(c) 3d edit. Vol. 1, p. 92.

(d) 1 Broom's Practice, 192.

(e) Citing *Nelson v. Wilson*, 6 Bing. 568, 4 M. & P. 385.(g) Citing *Jordan v. Hunt*, 3 Dowl. P. C. 666; *Quested v. Callis*, 10 M. & W. 18; *Marr v. Smith*, 4 B. & Ald. 466.(h) Citing *Hart, Ex parte*, 1 B. & Ad. 660.(i) Citing *Jordan v. Hunt*, 3 Dowl. P. C. 666.(k) Citing *Clarke v. Smith*, 1 D. & L. 960.

right to do. And the plaintiff can hardly be said to be a pauper, when he has received 100*l.*, out of which he might have paid his attorney.

WILDE, C. J. In cases of this description, the court requires a clear case of collusion to be made out, before they will, at the instance of the plaintiff's attorney, interfere to prevent effect being given to an adjustment of the disputes between the parties themselves. Here is a transaction of considerable magnitude. The plaintiff's claim amounts to 1646*l.* 11*s.* 9*d.*; against which the defendant claims to set off 1782*l.* 16*s.* 10½*d.* for cash advanced and goods supplied to the plaintiff. The matters in difference were agreed to be referred to surveyors. The order of reference gave the arbitrators no power to enlarge the time for making their award. By consent the time was enlarged once. But the enlarged time having been suffered to elapse, and the parties not agreeing to a further enlargement, no award was ever made. In this state of things, the defendant enters into a negotiation with the plaintiff, proposing to give him 100*l.*, in satisfaction of all demands; and the plaintiff agrees to accept that sum. What is the evidence of collusion between the parties to defraud the attorney, prior to the time of the settlement? There is absolutely nothing in any of the affidavits to justify us in coming to the conclusion that the parties entertained a design to deprive the plaintiff's attorney of his costs. The sum paid,—*100*l.*,—was not a mere nominal sum: it put the plaintiff in a position to pay his attorney [*737 if he had been honestly inclined. It was no part of the defendant's duty to see that the attorney was paid. All that was incumbent on him, was, to forbear from colluding with the plaintiff to deprive the attorney of his fair remuneration. Then, what is there in the circumstances that occurred after the settlement was effected, to show collusion? The substance of the affidavits is, that the plaintiff and defendant were seen to be upon very friendly terms, and that the plaintiff, on being asked if he had paid his lawyer his expenses, said—"No. Mr. Webb and I have made that all right; and the lawyers may go to hell." Undoubtedly, this was very ungenerous conduct on the part of a pauper plaintiff towards his attorney: and, if I could discover any evidence of collusion on the part of the defendant, I should feel much satisfaction in visiting him with costs. But I find no such evidence, nor even any fair ground of suspicion of collusion. The defendant is not to be held responsible for the coarse expression imputed to the plaintiff.

The only mode the defendant had to relieve himself from the proceedings on the part of the plaintiff's attorney, was, to come to the court. Has he come too late? The reference having gone off, notice of trial was given on the first of January, 1849, for the first sitting in Hilary term. On the 9th, the plaintiff's attorney receives notice that the action has been settled; on the 12th, he gives the defendant's attorney notice to produce, inspect, and admit; and on the 22d, he obtains a judge's order for the production of documents by the defendant, for the purpose

of stamping them. It is said that the defendant should have come to the court to set aside that order. But, having already given the plaintiff's attorney notice that the action was settled, *I think he was perfectly justified in leaving him to pursue his own course. This application was made on the 25th of January. The plaintiff's attorney has proceeded, upon a supposition that he had a lien on the debt for his costs. In this he is mistaken. The plaintiff has unquestionably acted in a most unhandsome and ungenerous manner towards his attorney. But I think justice to the defendant requires that this rule should be made absolute in its terms.

COLTMAN, J. Settlements between the parties in pauper causes should be watched with considerable jealousy. (a) If, in this case, the plaintiff's attorney had, before the money was paid, given notice to the defendant not to settle with the plaintiff until his claim for costs was satisfied, I should have thought the affidavits, unanswered, made out a case of collusion. But here the plaintiff's attorney did not take that step. And there was nothing to lead the defendant to suppose that any fraud would be committed by the plaintiff upon his attorney. It does not appear that the ground upon which the attorney was proceeding with the action, was ever distinctly notified to the defendant. And that, I think, is excuse enough for his abstaining from negating collusion, by anticipation.

GRESSWELL, J. I agree with the lord chief justice and my brother COLTMAN in thinking that this rule ought to be made absolute. The defendant's affidavit certainly might have been more satisfactory as to the arrangement about the 100*l*. It was, however, for the plaintiff's attorney to make out a case of collusion. It is said that the plaintiff and defendant are co-conspirators, and therefore what is said or done by one is evidence against both. Assume that they were co-conspirators, what was said by Francis after the completion of the transaction, was clearly no evidence as against Webb of any preconcerted conspiracy. The attorney has failed to make out a case to justify our interference on his behalf.

V. WILLIAMS, J., had gone to chambers.

Rule absolute, with costs.

(a) See *Wright v. Burroughs*, 3 Man. Gr. & S. 344, 4 D. & L. 226, and *Jones v. Bonner*, 2 Exch. 230, 5 D. & L. 718.

COOPER v. PENNEFATHER. April 30.

The statute 3 & 4 W. 4, s. 42, s. 23, does not authorize the amendment of the record upon the trial of an issue of *nul tiel record*.

UPON an issue of *nul tiel record* in debt on a judgment, the record

being produced, it showed a recovery of 20*l.* for debt and 6*l.* for damages and costs; whereas the declaration claimed the whole 26*l.* as damages for the detention of the debt.

Barstow, for the defendant, submitted that the record produced did not sustain the issue; and he cited *Munkenbeck v. Bushnell*, 1 Scott, 569, to show that the court would not allow the variance to be amended, without a substantive application for that purpose.

T. Jones, contra, insisted that the plaintiff was entitled to ask to have the record amended under the 3 & 4 W. 4, c. 42, s. 23.(a) [MAULE, J. Does that statute apply to *the case of a trial of an issue of *nultiel record*?] Such a case is clearly within the mischief of the pre- [*740amble; *and the enacting part of the clause does not exclude it. A distinction is taken between trials at nisi prius and trials by [*741the court. [MAULE, J. That may mean a trial at bar, or by an inferior court of record. When the statute speaks of the terms upon which the

(a) Which recites that, "great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variance as to some particular or particulars between the proof and the record or setting forth on the record or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the misstatement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence, and the record; and that it is expedient to allow such amendments as hereinafter mentioned to be made on the trial of the cause:" and enacts "that it shall be lawful for any court of record holding plea in civil actions, and any judge sitting at nisi prius, if such court or judge shall see fit so to do, to cause the record, writ, or document on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a *quo warranto*, or proceedings on a *mandamus*, when any variance shall appear between the proof and the recital or setting forth on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the court, or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms, as to payment of costs to the other party, or postponing the trial, to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and, in case such variance shall be in some particular or particulars in the judgment of such court or judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable; and, after any such amendment, the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared; and, in case such trial shall be had at nisi prius, or by virtue of such writ as aforesaid, the order for the amendment shall be endorsed on the *postea*, or the writ, as the case may be, and returned together with the record or writ; and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and, in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had: provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at nisi prius, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued, for a new trial upon that ground; and, in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet."

amendment is to be allowed, it speaks of "postponing the trial, to be had before the same or another *jury*." The 24th section,—which enacts "that the said court or judge shall and may, if they or he think fit, in *all* such cases of variance, instead of causing the record or document to be amended as aforesaid, direct *the jury* to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said court, or the court from which the record has issued, shall, if they shall think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case,"—shows that all the cases that fall within s. 23, are cases that may be tried before a jury.] The court has power to amend, independently of the statute. [MAULE, J. This court has every power of amending that existed at common law.] Then, the amendment being quite a matter of course, the record may be considered as amended, and the plaintiff may ask for judgment at once.

*742] *MAULE, J. You may have a rule nisi to amend, against which cause may be shown at the proper time. If the plaintiff does not choose to take that course, the defendant must have judgment.

Per curiam.(a)

Judgment for the defendant.

(a) COLTMAN, J., MAULE, J., and V. WILLIAMS, J.

SARGENT v. GANNON. April 30.

An attorney's bill, to be in strict compliance with the statute 6 & 7 Vict. c. 73, s. 37, must contain, in express terms, or by reasonable inference, a statement of the name of every cause and of every court in which any part of the business charged for has been transacted.

A bill of costs headed "Yourself v. Round" (the client's name being Gannon), and endorsed "Hancock v. Round," was enclosed in a signed letter addressed to Gannon, beginning "Hancocks v. Round,—I send you my bill in this matter." All the business comprised in the bill had reference to a purchase of land under a decree of the court of Chancery in a cause of "Hancock v. Round:—Held, that the name of the cause sufficiently appeared.

The bill was not headed in any court: but the whole related to one transaction, and some of the items were for attendances at the accountant-general's and at the master's offices, and in court upon a petition to the Vice-Chancellor:—Held, that the bill gave reasonable information to the client as to the course to be pursued in order to tax the bill, and therefore that the statute was complied with.

DEBT for work and labour, money paid, and money found due upon an account stated.

Plea (amongst others), that the work and labour were done and bestowed, and the money paid by the plaintiff, as attorney and solicitor for the defendant; and the account stated in respect thereof, and that no signed bill was delivered pursuant to the statute.

Replication, that, pursuant to the requisites of the statute, the plaintiff, one calendar month before action, sent by post to the defendant a

bill enclosed in, and accompanied by, a letter subscribed with the proper hand of the plaintiff, &c. Issue thereon.

The cause was tried before V. WILLIAMS, J., at the *second sitting in Middlesex, in Easter term last. The facts were as follows:—The plaintiff had been employed as solicitor for the defendant, upon the purchase by the latter of certain copyhold property which was sold in pursuance of a decree of the court of Chancery made in a cause of *Hancock v. Round*. [*748]

The bill of costs,—which was sent to the defendant by post, in a letter signed by the plaintiff, commencing, “*Hancocks v. Round*. I send you my bill in this matter,”—was endorsed “*Hancock v. Round*,” but was headed and commenced thus:—

“E. M. Gannon, Esq., to R. Sargent.

“Yourself *v. Round*.

“Trinity term, 1845.

“*May 23*. Attending you on your calling on me with particulars and conditions of sale of property under this decree, perusing and considering the same, as it was your intention to become the purchaser of lot 1, if possible - - - — — —

“Attending you afterwards, when you stated you had purchased lot 1, and instructed me to do what was necessary to complete the purchase - - - - - 0 6 8

“Attending accordingly at the master’s office, bespeaking copy of master’s report, and attending for same - - - 0 6 8

“31. Paid for it - - - - - 1 0 0

“Paid transcribing - - - - - 0 3 4

“Attending to file report; bespeaking office-copy - - - 0 6 8

“Instructions to counsel to move for order to confirm master’s report of purchase - - - - - 0 10 6

“Attending court, order made: copy and service of order on plaintiff’s solicitors; the like on defendant’s solicitors - - - 0 13 4

*744] “*July 18*. Instructions to counsel to move to make order absolute - - - - - 0 13 4

“21. Attending court, order made absolute - - - 0 13 4

“Writing you, requesting a remittance of the purchase-money, to pay into the bank - - - - - 0 5 0

“28. Attending to draw up order absolute confirming master’s report - - - - - 0 6 8

“Instructions to counsel to move for leave that the Vice-Chancellor WIGRAM may be applied to for an order to pay purchase-money into court - - - - - 0 13 4

“Attending court, order made - - - - - 0 6 8

“Instructions to counsel to move Vice-Chancellor WIGRAM

for leave to pay money into court pursuant to order of Lord Chancellor	£	s.	d.
	0	13	4
“Attending court, order made	0	13	4
“August 6. Writing defendant's solicitors, requesting them to send me abstract of title	0	5	0
“Attending and comparing abstract with original deeds	2	2	0
“14. Attending for order to pay in purchase-money	0	6	0
“22. Attending to lodge office-copy at accountant-general's office, and bespeaking ticket to pay in purchase-money and interest: attending for same	0	6	8
“Attending at the Bank of England, paying in 113 <i>l.</i> 10 <i>s.</i> 7 <i>d.</i> , taking receipt	1	1	0
“December 11. Attending counsel this day, when he advised that the title would be bad, if certain parties did not join in the conveyance	0	6	8
“Attending you in conference with reference to counsel's opinion on the conveyance	0	6	8
“Attending at the accountant-general's, doing the needful to prevent defendant's solicitors from taking money out of court	0	6	8
*Hilary term, 1846.			
*745] “January 10. Many attendances upon you with reference to rescinding the contract, which you were desirous of doing, if possible; when I suggested the propriety of having a consultation with an eminent Queen's counsel, prior to taking any step for that purpose, and you expressed your approval of that course being adopted	0	6	8
“Attending consultation, when Mr. J. P. considered that the vendors could not make a good title, and recommended that you should present a petition to have your purchase-money paid out of court to you	0	13	4
“Instructions for petition	0	13	4
“Two fair copies for the Lord Chancellor	1	0	0
“23. Attending court at Westminster, when Mr. J. P. advised that the prayer of the petition should be amended, and leave of the court was accordingly obtained for that purpose	0	13	4
“Having been served with warrant to settle the conveyance before the master, attending same, when the master refused to interfere in the matter until the petition had been disposed of	0	6	8
“Attending at Westminster to amend the Vice-Chancellor's copy petition	0	6	8
“February 14. Attending court this day, when petition argued, and dismissed with costs	0	13	4
“28. Attending warrant to settle conveyance before the master, when, after hearing solicitors on both sides, he took time to consider his judgment	0	6	8

"*March 14.* Attending to bespeak copy of plaintiff's costs; £ s. d.
afterwards, for same - - - - - 0 6 8

*On the part of the defendant, it was contended that the bill did not sufficiently show the *court* and the *cause* in which the business therein contained had been transacted, to satisfy the statute 6 & 7 Vict. c. 73, s. 37.(a) For the plaintiff it was insisted that the *statute had been complied with. *Martindale v. Falkner*, 2 Man. Gr. & S. 706, and *Engleheart v. Moore*, 15 M. & W. 548, were cited. [*747

The learned judge directed a verdict for the plaintiff for the amount

(a) Which enacts "that no attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or, in case of a partnership, by any of the partners, either with his own name or with the name or style of such partnership), or of the executor, administrator, or assignee of such attorney or solicitor, or be enclosed in or accompanied by a letter subscribed in like manner, referring to such bill: Provided that it shall be lawful for any judge of the superior courts of law or equity to authorize an attorney or solicitor to commence an action or suit for the recovery of his fees, charges, or disbursements against the party chargeable therewith, although one month shall not have expired from the delivery of a bill as aforesaid, on proof to the satisfaction of the said judge that there is probable cause for believing that such party is about to quit England: And, upon the application of the party chargeable by such bill, within such month, it shall be lawful, in case the business contained in such bill, or any part thereof, shall have been transacted in the high court of Chancery, or in any other court of equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any court of law or equity, for the Lord High Chancellor or the Master of the Rolls, and, in case any part of such business shall have been transacted in any other court, for the courts of Queen's Bench, Common Pleas, Exchequer, court of Common Pleas at Lancaster, or court of Pleas at Durham, or any judge of either of them, and they are hereby respectively required, to refer such bill, and the demand of such attorney or solicitor, executor, administrator, or assignee, thereupon, to be taxed and settled by the proper officer of the court in which such reference shall be made, without any money being brought into court; and the court or judge making such reference shall restrain such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, from commencing any action or suit touching such demand pending such reference: and, in case no such application as aforesaid shall be made within such month as aforesaid, then it shall be lawful for such reference to be made as aforesaid, either upon the application of the attorney or solicitor, or the executor, administrator, or assignee of the attorney or solicitor whose bill may have been so as aforesaid delivered, sent, or left, or upon the application of the party chargeable by such bill, with such directions, and subject to such conditions as the court or judge making such reference shall think proper: and such court or judge may restrain such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, from commencing or prosecuting any action or suit touching such demand pending such reference, upon such terms as shall be thought proper: Provided always, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill, after a verdict shall have been obtained or a writ of inquiry executed in any action for the recovery of the demand of such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, or after the expiration of twelve months after such bill shall have been delivered, sent, or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made: and, upon every such reference, if either the attorney or solicitor, or executor, administrator, or assignee of the attorney or solicitor whose bill shall have been delivered, sent, or left, or the party chargeable with such bill, having due notice, shall refuse or neglect to attend such taxation, the officer to whom such reference shall be made, may proceed to tax and settle such bill and demand *ex parte*."

of the bill, reserving to the defendant leave to move to enter a verdict for him, if the court should be of opinion that no proper bill had been delivered.

Humfrey accordingly obtained a rule nisi. In addition to the cases *748] mentioned at the trial, he referred to *Lewis v. Primrose*, 6 Q. B. 265: and *WILDE*, C. J., observed—"No one, looking at the bill, could doubt in what court the applications were made. But the difficulty I feel is as to the heading, '*Yourself v. Round*,' there being no such cause as '*Gannon v. Round*.'"

Byles and *Kinglake*, Serjts., and *Ball*, now showed cause. Most of the cases were decided upon the 2 G. 2, c. 23, s. 23, which did not, in terms, require the name of the court and cause to appear on the face of the bill. The decisions, however, require both to appear. Under the former act, it was essential that the client should be informed of the name of the cause: but the like necessity does not exist under the recent statute. Assuming it to be necessary, it is impossible to say that the client could have been misled by the manner in which it is stated here. The endorsement on the bill and the heading of the letter show a perfect compliance with the statute. [*WILDE*, C. J. It will be contended that the signature to the letter is no signature of the bill: they relate to different causes.] It is, as the letter states, a bill of costs in the matter referred to. "*Yourself v. Round*" represented a petition in the cause of "*Hancock v. Round*." In *Anderson v. Boynton*, 12 Law Times, 421, it was held that an attorney's bill for conducting the defence of a shareholder in a joint-stock bank, to a *scire facias* upon a judgment against the public officer, is sufficient if it state the court in which the business was done, and the nature of the proceedings can be gathered from the items in the bill, though the technical name of the original cause, or the *scire facias*, be not stated. There, the bill was headed "Mr. John Boynton to Robert E. Anderson. In the Exchequer of Pleas" (the court in which all the *749] proceedings connected with **Esdaile v. Wood* had been taken): it was not headed with the name of any cause; but the cause of *Esdaile v. Wood* was mentioned by name in one item, and the others spoke of the proceedings taken by the London and Westminster Bank against the defendant and Lund. Lord DENMAN, in giving the judgment of the court, said: "It was contended for the defendant, that the name of the cause, as well as of the court, ought to have been specified; and his counsel quoted *Lewis v. Primrose*, *Engleheart v. Moore*, *Martindale v. Falkner*, and *Ivimey v. Marks*, 16 M. & W. 843: but the result of these cases appears to be, that the court and the cause must be so specified as to enable the client, by the bill alone, to take upon himself the duty of taxation. In this case, enough appears to have been stated of the facts for that purpose: the court is named, and the original cause is specified; and that description would be more intelligible to the client than the technical name, the parties to the suit being probably known by

the names of the banks or the public officers, as well as by those of the technical name given when a copy of the judgment was obtained. With respect to the proceeding on *scire facias* against the defendant and others, the technical name in the *scire facias*, when brought to trial, would not facilitate the taxation; and we cannot discover any reason for thinking that the particulars which are given are insufficient for the purpose for which the delivery of the bill was required." [MAULE, J. You may assume that the name of *the cause* is sufficiently stated. *Humfrey* assented. CRESSWELL, J. Does the bill sufficiently show *the court* in which the business was done?] It is obvious that the proceedings are in Chancery. In which of the three courts is immaterial, so far as concerns the reference of the bill to taxation. [MAULE, J. *A skilful [*750 person might form a conjecture on the subject. The proceedings might have been in lunacy or bankruptcy.] It is enough, according to the opinions of the majority of the court in *Martindale v. Falkner*, if the court and the cause are capable of being collected by fair and reasonable intendment from the nature of the several items of charge. [MAULE, J. All these transactions might possibly have taken place in the Irish court of Chancery.] There is no Vice-Chancellor in Ireland. [MAULE, J. The 2 G. 2, c. 23, s. 23, shows the sort of people the legislature proposed to protect,—persons not technically skilled. It was not intended that a man who has been fleeced by one lawyer, should be compelled to have recourse to another for relief.] It is enough to show that the business is in Chancery. [MAULE, J. Does it appear upon this bill that *all* the business was done in the court of Chancery? Where the client has the option, he should have such information as to enable him to ascertain to which court he may apply for the taxation.] There is no one item in this bill that has not reference either to business done in the court of Chancery, or to conveyancing. The judgment of TINDAL, C. J., in *Martindale v. Falkner*, is quite conclusive. The court will not put a strained construction upon the bill, for the purpose of defeating the attorney's just claim.

Humfrey and *H. S. Wilde*, in support of the rule. If there be any one item in this bill that is capable of being taxed in a court that is not mentioned therein by name, this rule must be made absolute. In *Engleheart v. Moor*, ALDERSON, B., says: "This act, so far as it relates to the delivery and taxation of an attorney's bill, ought to be construed liberally for the client, and strictly for the attorney; for, the latter knows the law, and the former does not. With the view to the *taxation [*751 and payment of the bill, if the client desired it, the legislature intended that the client should be informed where each item of the business was done, and that the attorney should hold his hand for a month after the delivery of the bill, for the express purpose of giving the client a full opportunity of ascertaining whether the business was done, and whether the charges are reasonable. For this purpose, it is very material

that the bill should show in what court the business was done, because the fees are different in different courts; and, how can an attorney advise a party as to the propriety of taxing a bill, unless he knows in what court the fees were paid? Without such information, he could not know whether, upon taxation, one sixth of the bill would be struck off or not." So, in *Ivimey v. Marks*, it was held that an attorney is bound to specify in his bill, as well every court, as the name of every suit, in which the business charged for was done; and that such bill is an entire bill, and if the same bill blends charges for work done in a court of equity with charges for work apparently done in some court of common law, without pointing out which, the client cannot judge or be advised, whether he should refer the whole bill for taxation; and the charges in the same bill for equity business, though correctly stated, cannot be recovered. The court will not be disposed to extend the doctrine of *Martindale v. Falkner*.

COLTMAN, J.(a) It appears to be established by the cases, that there are two requisites to make an attorney's bill of costs a compliance with the statute, viz. that it should contain the name of the cause and also that of the court in which the business charged for has been transacted.

*752] At the same time, it appears to *me, that in ascertaining whether or not these two essentials concur, we are bound to apply every reasonable and fair intendment to the language of the bill; for, though I agree that the act ought to be so construed as to give the client the benefit intended, yet we are not to shut our eyes to the attorney's claim to have equal justice meted out to him also. Having carefully looked through this bill, and construing it as I have suggested, all the business therein mentioned, does appear to me to have been transacted before the Lord Chancellor and the Vice-Chancellor: and that seems to me to be a sufficient intimation to the client as to the place to which he is to have recourse for its taxation. It is true that the client is not to be supposed to be conversant with law: but he must be assumed to be acquainted with the ordinary business of life. He must know that the Lord Chancellor transacts business in the court of Chancery. And every suitor there may reasonably be taken to know who are the great officers of that court. If any part of the business had been done elsewhere, or in a special manner, then the bill might have been faulty, as conveying untrue information to the client. Had the bill, for instance, contained any items leading to a supposition that any of the business had been transacted in a court of common law, that would have been ground for holding it to be insufficient. But nothing of the sort appears: it is not pretended that the whole business was not in Chancery. I think ample information is conveyed by the bill, and that there is nothing to justify any doubt in the matter.

As to the name of the cause,—although some little difficulty is introduced by the heading of the bill "*Yourself v. Round*," I think that is

(a) WILDE, C. J., was absent.

corrected by the endorsement: and, with respect to the insertion of the letter "s" in the original plaintiff's name, in the letter *in which the bill was enclosed, I think that is quite an immaterial variance. [*753]

For these reasons, I am of opinion that the rule ought to be discharged.

MAULE, J. As part of the argument took place on a former day, when I was not present, I take no part in the decision.

V. WILLIAMS, J. I also am of opinion that this rule ought to be discharged. The only question is whether any person not a lawyer could be misled by this bill, or induced to doubt that the whole was for business done in the court of chancery. I think it is impossible that he could be.

Rule discharged.

BARDELL v. MILLER. April 28.

The endorsement on a writ of summons claiming a sum for principal and interest, should either state the amount of the interest claimed, or the date from which it is to be calculated.

The following endorsement was held insufficient:—"The plaintiff claims 102*l.* 5*s.*, and interest thereon at 5*l.* per cent. per annum from the 31st of March (not saying what March) till payment, for debt, and 2*l.* 2*s.* for costs," &c.

TALFOURD, Serjt., on a former day in this term, obtained a rule calling upon the plaintiff to show cause why the copy of the writ of summons in this cause, and the service thereof, should not be set aside for irregularity. The irregularity complained of, was, that the endorsement on the writ of summons,—which was as follows, "The plaintiff claims 102*l.* 5*s.* and interest thereon at 5*l.* per cent. per annum from 31st of March till payment, for debt, and 2*l.* 2*s.* for costs; *and, if the amount thereof be paid to the plaintiff or his attorney within four days [*754 from the service hereof, further proceedings will be stayed,"—did not comply with the rule of Hilary term, 2 W. 4, r. II.,(a) which provides, "that, upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service, and attendance to receive debt and costs; and that, upon payment thereof within four days to the plaintiff or his attorney, further proceeding will be stayed," &c. The learned serjeant referred to Chapman v. Beeke, 3 D. & L. 350, and Allen v. Bussell, 4 D. & L. 430.

Gaselee, Serjt., *contra*, submitted that the endorsement was sufficiently certain, "the 31st of March" by fair intendment meaning March last; and that it was not necessary to state the amount of interest claimed—Copello v. Brown, 1 C. M. & R. 575, 5 Tyrwh. 217, 3 Dowl. P. C. 166.

(a) Extended by Reg. Gen. Michaelmas term, 3 W. 4, r. 5, to "all writs of summons, *distringas*, *copias*, and *detainer*, issued under the authority of the statute 2 W. 4, c. 39, and to the copy of every such writ."

[WILDE, C. J., referred to the cases of ejectment in which the notice which was without date, or required the tenant to appear at an impossible day, was yet held sufficient.]

Talfourd, Serjt., in support of his rule. The cases last adverted to have no application here. In those, the notice had relation to an act to be done, and was therefore held to speak from the time of service; whereas, in this case, the endorsement speaks of a by-gone transaction.

*755] *Chapman v. Becke*, though not *precisely this case, is sufficiently near to govern it. There, the writ was endorsed "the plaintiff claims 150*l.* and interest for debt, and 3*l.* 3*s.* costs;" and that was held irregular. PATTESON, J., said: "It appears to me that the rule of court is very clear. Its object is, to show the defendant, in express terms, what the plaintiff is contented to take, in order that the former may tender it, together with costs, within the four days; and therefore it is that such a notice is obliged to be endorsed on the writ. The plaintiff, consequently, ought to have stated what sum he claimed for interest, or from what time he claimed it. It is possible to conceive cases where the defendant could not find out from what time the interest was intended to be claimed. It may be that the plaintiff is not obliged to state the precise amount of interest, and that, according to the cases, it would be sufficient to say that interest at such a rate is claimed from a certain day. Without, however, going into that question, I think that the rule was framed for the purpose of giving specific information, which has not been afforded in the present case. The case of *Fitzgerald v. Evans*, 6 M. & G. 207, 6 Scott, N. R. 220, 2 Dowl. N. S. 916, is not a direct authority upon the point; but my lord chief justice and my brother MAULE seem both to have considered that the writ there might have been set aside for irregularity, for a similar defect to that which exists in the present case." [WILDE, C. J. In *Humphries v. Cullingwood*, 2 B. & Ald. 642, it was held to be no objection to the notice at the foot of a bill of Middlesex, that it wholly omitted to state the year, or the word *next*: the court observing—"It is unnecessary to state the year, because the party by the statement of the day of the month must understand that he is to appear at the earliest time to which the notice *could apply." The court will hardly allow *756] any intendment to prevail against the plain words of a rule the compliance with which is so easy.

WILDE, C. J. It is to be very much lamented that parties should be put to so much expense in relation to a rule which was framed for the express purpose of avoiding expense. The rule is one of considerable importance: it enables the defendant to ascertain, at an early stage of the proceedings, the exact sum that is demanded of him. If he chooses to make a legal tender of a less sum, if it turns out that the sum tendered is all that he really owes, he is not liable for any further costs. It seems to me to be a rule that is obviously founded in convenience and

good sense: to depart from it is to introduce uncertainty and promote litigation. The rule is simple in its terms, and may easily be complied with. The court in all cases best discharges its duty by adhering to the plain words of an act of parliament or a rule. The rule in question requires that information be given to the defendant, by the endorsement on the writ, as to the precise amount which the plaintiff claims for debt and for costs. Here, the endorsement states that the plaintiff claims a certain sum, and interest thereon at a given rate "from the 31st of March"—leaving it quite uncertain whether that refers to the March immediately antecedent to the service of the writ, or the month of March in some preceding year. I am of opinion, therefore, that the endorsement does not give the defendant such information as the rule of court contemplated and intended that he should have, and that it is not a compliance either with the letter or with the spirit of the rule. This rule, therefore, will be made absolute.

The rest of the court concurring,

Rule absolute.

***SMITH and Another v. TROUP. April 17. [*757**

The attorney on the record has authority to consent to a reference on behalf of his client.

A personal demand of money payable under an award, with a view to a proceeding on a rule of court under the 1 & 2 Vict. c. 110, s. 18, may be dispensed with, where the party is evidently keeping out of the way to avoid the demand.

By an order of reference made in this cause on the 28th of July, 1845, "upon hearing the attorneys on both sides, and by their consent," it was ordered, *inter alia*, "that it be referred to the award, order, arbitration, final end, and determination of James Crosby, of, &c., gentleman, to ascertain what sum was due to the plaintiffs from the defendant on the 3d of April, 1844, and that the said James Crosby shall make and publish his award in writing of and concerning the matters referred, ready to be delivered to the said parties in difference, or such of them as shall require the same, on or before the 15th of September now next ensuing, or such other day as the said parties shall mutually agree upon, being not more than one calendar month after the said 15th of September; that the costs of the cause shall abide the event; and that the costs of the reference and award shall be in the discretion of the arbitrator."

The time for making the award was by various orders, made "upon hearing the attorneys on both sides, and by consent," enlarged until the first day of Michaelmas term, 1847: and, on the 1st of November in that year, the arbitrator made his award as follows:—

"I do first ascertain, award, order, and determine that the sum of 83*l*. 17*s*. was due to the said plaintiffs George Smith and William Barnes, from the said defendant James Troup, on the 3d day of April, 1844, and that the same is still due and unpaid: And I award, order, and

direct the said sum of 83*l.* 17*s.* to be paid by the said defendant James *758] Troup to the said plaintiffs *George Smith and William Barnes on the 1st of December now next: And I do further award, order, and direct that the costs of the said reference shall be borne and paid by the said James Troup: And I do further award, order, and direct that one moiety of the costs of this my award shall be paid by the said George Smith and William Barnes, and the other moiety thereof by the said James Troup."

On the 8th of December, 1847, the defendant was duly served with a copy of the award, and of the rule making the order of reference a rule of court, and also with an appointment to tax the costs. The taxation was attended by the defendant's attorneys, pursuant to the appointment, when the plaintiff's costs of the cause and of the reference, including one moiety of the costs of the award, were allowed at the sum of 42*l.* 11*s.*

On the 20th of December, 1847, the plaintiffs executed a power of attorney, whereby, after reciting the order of reference, the award, and the allocatur, they appointed Deane, Dyke, and Shorter their joint and separate attorneys, "for them, and in their names, and for their use and benefit, to ask, demand, recover, and receive of and from the said James Troup, the sum of 126*l.* 8*s.*, which said sum comprises the said sum of 83*l.* 17*s.* so awarded to them as aforesaid, as due to them from the defendant, and 42*l.* 11*s.*, being the amount of such taxed costs; and also from time to time to substitute, nominate, and appoint one or more attorney or attorneys under them, the said Deane, Dyke, and Shorter, for all or any of the purposes aforesaid, and again at their pleasure to displace and remove, as they shall see occasion or think fit; they, the said George Smith and William Barnes, thereby ratifying and allowing, and promising and agreeing from time to time and at all times thereafter, to ratify, allow, and confirm all and whatsoever they, the said *759] Deane, Dyke, and Shorter, *or their lawful attorney or attorneys, to be by them from time to time nominated and appointed, in pursuance of the power thereinbefore given to them for that purpose, should lawfully do or cause to be done in and concerning the premises, by virtue of those presents."

On the 2d of August, 1848, the defendant was personally served by one Walduck, a process-server, with a copy of the master's allocatur, and of the power of attorney, and a written demand of payment signed by Dean, one of the attorneys, requiring the defendant, within twenty-four hours, to pay the money at a place named,—the originals of such allocatur and demand being at the same time shown to him.

Upon affidavits setting forth the facts, and showing repeated attempts by Dyke to make a personal demand upon the defendant, and his inability to do so, in consequence of the defendant's migratory habits, and stating that the money was still unpaid,

Bramwell, in Hilary term last, moved for a rule calling upon the defendant to show cause why he should not be ordered to pay the two several sums of 83*l.* 17*s.* and 42*l.* 11*s.*, with a view to the plaintiffs' availing themselves of the provisions of the statute 1 & 2 Vict. c. 110, s. 18.(a) He referred to *Doe d. Steer v. *Bradley*, 1 Dowl. N. S. 259, where the court [*760 granted a rule to show cause why the sum mentioned in the master's allocatur upon a consent rule in an action of ejectment should not be paid, so as to enable the party to avail himself of the statute, although the allocatur could not be served personally, and, on a special affidavit of circumstances showing that personal service could not be effected, made that rule absolute; and also to *Hawkins v. Benton*, 2 D. & L. 465, where it was held, that, although the court in general requires the same formalities to be observed, as to personal service, with a view to an execution under this statute for a sum awarded, as in cases of attachment, yet, where it clearly appears from the admissions of the party that he was aware of the contents of the award, the court will, under special circumstances, grant a rule calling upon him to show cause why he should not pay the sum awarded. [WILDE, C. J. I never knew the court dispense with personal service, in the case of a proceeding to attachment, except where the party was shown to be keeping house, so as to evade the service.] The affidavits here clearly show that personal service was impossible. [WILDE, C. J. Very difficult, perhaps; but not impossible.] A rule nisi having been granted,

Montagu Chambers and *Hawkins* now showed cause, upon an affidavit of the defendant stating that he never consented, or authorized his attorney to consent, to a reference, that he never attended before the arbitrator; and that, before the award was made, he sent to the arbitrator and to the plaintiffs notice of his protest against the proceedings. Assuming that the defendant's *attorney had at one time authority to [*761 refer, the defendant's protest operated as a revocation: and, where the submission has been revoked before the making of the award, an attachment will not be granted: *King v. Joseph*, 5 Taunt. 452. [WILDE, C. J. Can you, in showing cause against an attachment for non-performance of an award, urge any objection not apparent on the face of the award?] In *Milne v. Gratrix*, 7 East, 768, it was held that a party is not

(a) Which enacts "that all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor or of the court of review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys, or costs, charges, or expenses, shall be payable, shall be deemed judgment-creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts, shall and may be exercised by courts of equity with respect to matters therein depending, and by the Lord Chancellor and the court of review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment-creditors are in like manner given to persons to whom any moneys, or costs, charges, or expenses, are by such orders or rules respectively directed to be paid."

liable to an attachment for not obeying an award, if made after a deed of revocation of the submission entered into before the submission was made a rule of court, and notice thereof given to the arbitrators. So, in *Dickenson v. Allsop*, 13 M. & W. 722, 2 D. & L. 657, it was held, that, where there is a doubt as to the validity of an award, the court will not grant a rule under the statute, calling upon the party to pay the sum awarded. In that case, the arbitrator had, although the order of reference gave him no power to do so, directed a verdict to be entered for the defendants.^(a) [WILDE, C. J. There the objection was apparent on the face of the award. In *Macarthur v. Campbell*, 2 Ad. & E. 52, 4 N. & M. 208, upon a motion for an attachment for not performing an award, the court declined to discuss objections to the award, not apparent on the face of it,—as, that the arbitrator was partial, or that matters were brought before him (the reference being of all matters in difference) which were not disposed of by the award. You are coming now with affidavits which the other side can have no opportunity of answering.] The court will not enforce by attachment a void award. [WILDE, C. J. That is, where the invalidity of the award is properly brought to the notice of the court.] At all events, the authority of the attorney to refer *762] *being denied, the court will not in this summary way enforce performance of the award, but will leave the plaintiffs to their remedy by action. [WILDE, C. J. If the attorney has improperly referred the matters, is not the client's remedy an action against him?] The fact of his having a remedy by action against his attorney, does not necessarily preclude him from urging the absence of authority as an answer to this rule. [WILDE, C. J. Have you any case where, under circumstances like the present, an attachment has been refused?] The ground of the objection is, that the arbitrator had no authority to make the award. The point was raised in *Flaviell v. The Eastern Counties Railway Company*, 2 Exch. 344, 17 Law Journ., N. S., Exch. 297. [GRESSWELL, J. And decided against you. PLATT, B. there says: "I think that an attorney who has been duly authorized to appear for a litigant, has incidentally authority to conduct the cause, and to refer it. If he does wrong, he may be responsible to his client; but his client is bound."]

The award is not properly verified by affidavit. [*Bramwell, contra*, submitted that it was too late, after an enlargement of the rule upon the merits, to take a preliminary objection.]

The award directs that the costs of the reference shall be borne and paid by the defendant, and that one moiety of the costs of the award shall be paid by each party. The master's allocatur includes the whole costs of the award, and there is no affidavit that the plaintiffs have paid the whole. [WILDE, C. J. Must we not accredit the act of the master? We will assume, as in the case of payments made to witnesses, and the

(a) See *Cook v. Gent*, 2 D. & L. 364.

like, that the master had proper evidence of the payment before him.] The master has no control over the arbitrator's charge.

*Then there has been no sufficient demand of performance of the award. There should have been a personal demand by one of the persons named in the power of attorney: whereas, here was a mere service by a process-server of a written notice, signed by one of the attorneys, requiring the defendant to attend at a certain place to pay the money. [WILDE, C. J. If this were a motion for an attachment, there would be weight in the objection. But, is the same sort of demand indispensable in the case of an application under this statute?] It has repeatedly been held so: *Neale v. Postlethwaite*, 1 Q. B. 243, 4 P. & D. 643; *Jones v. Williams*, 8 M. & W. 349, 9 Dowl. P. C. 702; *Doe v. Amey*, 8 M. & W. 565, 1 Dowl. N. S. 23. In *Wilson v. Foster*, 6 M. & W. 149, 6 Scott, N. R. 936, where a defendant who was abroad, was directed by an award to pay a sum of money, and it did not appear that he had been served with the award, though a letter from him showed that he was aware of its effect, this court refused to grant a rule calling upon him to pay the money. So, in *Pearson v. Archbold*, 11 M. & W. 108, the court of Exchequer declined to grant a rule calling upon a party to pay money found by an award to be due from him, without an affidavit of the service of the award. The like was held in *Abrahams v. Taunton*, 1 D. & L. 319. There, *Lee*, for the plaintiff, contended, that, if it was apparent to the court that the party kept out of the way to avoid service, personal service would be dispensed with. But Lord ABINGER, C. B., said: "We ought not to apply to this case a different principle from that by which we are guided in granting an attachment. You certainly could not have an attachment against a party merely by showing that a copy of the allocatur had been left at his house. It is said that the **prochein amy* keeps out of the way to avoid being served; if that is so, the defendant should have moved for a rule to show cause why the service of the allocatur in a particular way should not be deemed good service. In my opinion, the court ought only to assist a party in applications of this kind, where the same proceedings have been taken as under an attachment." And in *Winwood v. Houlst*, 14 M. & W. 197, 3 D. & L. 85, personal service was held to be indispensable. [*763]

Bramwell was not called upon by the court to support his rule.

WILDE, C. J. This is an application, with a view to the remedies given by the 1 & 2 Vict. c. 110, s. 18, calling upon the defendant to show cause why he should not make certain payments pursuant to the terms of an award. The first answer attempted to be given to the rule, is, that the reference took place without the defendant's authority,—that reference appearing to have been consented to by the defendant's attorney. Generally speaking, the attorney on the record has authority to refer the cause. If he exceeds his authority, the other party is not to be pre-

judiced: the client has his remedy against his attorney. The main ground, therefore, upon which the resistance to this rule has rested, seems to me to fail. That being so, it is unnecessary for us to consider whether the objection, if established, would be an answer to the rule. I certainly have a strong impression on the subject, though I do not think proper on this occasion to interfere with any of the authorities.

Independently of the objection on the merits, it is said that the formal requisites of an application of this sort have not been complied with.

*765] Various authorities *have been cited for the purpose of showing that the same formalities must be observed upon moving for an order upon the party to pay money awarded, as upon moving for an attachment. The case of *Hawkins v. Benton*, however, shows that the courts will dispense with the strict observance of the rule requiring the demand to be personal, where it is made evident to them that the party has been evading service. The affidavits in the present case are extremely strong to show how industriously the defendant has been hunted from place to place for the purpose of making a personal demand on him. I therefore think this is a case in which the strict rule may, on the authority of *Hawkins v. Benton*, be dispensed with.

It is further objected that the sum demanded is composed, in part, of an uncertain amount, as, a moiety of the sum paid for the award. The order of reference provides that the costs of the cause shall abide the event, and the costs of the reference and award be in the discretion of the arbitrator: and the arbitrator has by his award directed that the costs of the reference shall be paid by the defendant, and that a moiety of the costs of the award shall be paid by each party. The affidavits upon which the motion is founded, show that the master's allocatur includes a moiety of the costs of the award. It is objected, on the part of the defendant, that it is nowhere sworn that the plaintiffs have paid the whole expense of the award. It is not pretended, however, that the plaintiffs have not taken up the award; and it is reasonable to suppose they have paid the whole of the fees; for, it is not to be presumed that the award would be delivered out until the fees were paid. The matter goes before the master, and he allows the plaintiffs a certain sum as and for a moiety of the expense of the award. It is said that the master has improperly allowed that sum. That is an objection to the taxation, *766] *which is not now before us. But it seems to me that the master has acted according to the universal practice.

Upon the whole, it appears to me, that no sufficient cause has been shown against the rule, and therefore that it must be made absolute.

The rest of the court concurring,

Rule absolute.

ROSS v. GANDELL. May 7.

The omission to insert in a writ of summons the county of the defendant's residence, is a mere irregularity, which must be taken advantage of within a reasonable time.

Under the 2 W. 4, c. 39, s. 3, the application for leave to enter an appearance, upon the return of the *distringas*, must, in term time, be made to the court.

A WRIT of summons in an action on promises issued against the defendant, at the suit of the plaintiff, on the 2d of March last, in which the former was described as "John H. Gandell, of No. 3, Parliament Street, in the city of Westminster."

On the 27th of March, the plaintiff obtained a writ of *distringas*, under a judge's order, to compel the appearance of the defendant, upon an affidavit of a clerk of the plaintiff's attorney, stating calls at the office of the defendant, No. 3, Parliament Street, for the purpose of serving the writ of summons, on the 5th, 8th, 12th, 14th, and 16th of March, the last four times pursuant to appointment, and a copy having been left on the fourth call, which copy the deponent was on the last call informed by the clerk to whom he delivered it, had been sent to the defendant's solicitor.

The *distringas* having been on the 16th of April returned *non est inventus* and *nulla bona*, the plaintiff, on the 24th, obtained an order from MAULE, J., at chambers, to enter an appearance for the defendant,—the affidavit upon which that order was obtained describing the action to be *in debt*, instead of *on promises*. *An appearance was accordingly entered on the 25th of April: and, on the 30th, [*767

Ball obtained a rule calling upon the plaintiff to show cause why the writ of summons, the service thereof, and all subsequent proceedings, should not be set aside for irregularity. He referred to the 1st section of the 2 W. 4, c. 39, which enacts, that, in every writ of summons issued under the authority of that act, the place *and county* of the residence, or supposed residence, of the party defendant, shall be mentioned; and that every such writ may be served in the manner theretofore used, *in the county therein mentioned*, or within two hundred yards of the border thereof, and not elsewhere: and he submitted, that the writ of summons was *absolutely void* for omitting to mention *the county* of the defendant's residence; and, further, that the appearance was entered without authority, the 3d section of the statute giving no power to a judge at chambers to make an order for that purpose *in term time*.

Fitzherbert now showed cause. As far as regards the writ of summons, that which is complained of here is a mere irregularity: for, by the 10th rule of Michaelmas term, 3 W. 4, it is provided, that, "if the plaintiff, or his attorney, shall omit to insert in, or endorse on, any writ or copy thereof, any of the matters required by the 2 W. 4, c. 39, to be by him inserted therein or endorsed thereon, such writ, or copy thereof, shall not, on that account, be held void, but it may be set aside as irregu-

lar, upon application to be made to the court out of which the same shall issue, or to any judge." In *Child v. Marsh*, 6 Dowl. P. C. 576, 3 M. & W. 433, 1 H. & W. 106, where a writ of summons stated the *defendant to be resident within the county of Worcester, whereas *768] he in fact resided within the city of Worcester, and was served there, it was held,—upon the authority of *Tyler v. Green*, 3 Dowl. P. C. 439, and *Edwards v. Collins*, 5 Dowl. P. C. 228,—that an application to set aside the service should be made within the time limited for entering an appearance. The only case in which process has been held void, is, where it was dated on a Sunday.(a) [WILDE, C. J. It certainly is too late to ask the court to set aside a writ, for irregularity, after an appearance has been entered. *Ball*. We say there has been no appearance.] The defendant was at all events bound to come within a reasonable time: R. Hilary term, 2 W. 4, r. 33.(b) The defendant must be assumed to have had notice of the irregularity, at the latest, on the 16th of March, when the clerk admitted that the copy writ of summons had been sent to the defendant's attorney. The *distringas* was obtained on the 27th of March; and, on the 16th of April, it was returned *nulla bona* and *non est inventus*: the plaintiff obtained leave to enter an appearance for the defendant on the 24th; an appearance was entered on the 25th; and no step was taken by the defendant until the 30th. That objection, therefore, is waived.

The order for the appearance was well warranted by the statute, and its validity was not affected by the clerical error in the affidavit upon which it was founded. The third section of the uniformity of process act, 2 W. 4, c. 39, upon which the question arises, enacts, that, "in case it shall be made appear by affidavit to the satisfaction of the court out of which *769] the process issued, *or in vacation, of any judge of either of the said courts, that any defendant has not been personally served with any such writ of summons as hereinbefore mentioned, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled to do so without some more efficacious process, then and in any such case it shall be lawful for such court or judge to order a writ of *distringas* to be issued, directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, or to the sheriff of any other county, or to any other officer to be named by such court or judge, in order to compel the appearance of such defendant; which writ of *distringas* shall be in the form, and with the notice subscribed thereto, mentioned in the schedule to this act, marked No. 3; which writ of *distringas* and notice, or a copy thereof, shall be served on such defendant, if he can be met with, or, if not, shall be left at the place

(a) *Hanson v. Shackleton*, 4 Dowl. P. C. 48.

(b) "No application to set aside process or proceedings, for irregularity, shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity."

where such *distringas* shall be executed, &c.; and, if such writ of *distringas* shall be returned *non est inventus* and *nulla bona*, and the party suing out such writ shall not intend to proceed to outlawry or waiver, according to the authority hereinafter given, and any defendant against whom any such writ of *distringas* issued shall not appear at or within eight days inclusive after the return thereof, and it shall be made appear by affidavit to the satisfaction of *the court* out of which such writ of *distringas* issued, or, *in vacation, of any judge of either of the said courts*, that due and proper means were taken and used to serve and execute such writ of *distringas*, it should be lawful for *such court or judge* to authorize the party suing out such writ, to enter an appearance for such defendant, and to proceed thereon to judgment and execution." It has, undoubtedly, been usual to apply for the *distringas*, in term time, to *the court*: that, however, is mere matter of *practice; there are no [770 words in the act to exclude the jurisdiction of the judge at chambers, at any time, to make an order for a *distringas*, or to enter an appearance thereon. In *Smeeton v. Collier*, 1 Exch. 457,—where a question arose upon the statute 7 G. 2, c. 20,(a)—POLLOCK, C. B., says: "Where the legislature simply gives a power to *the court*, it is to be taken that the court receives all the ordinary powers necessary for that purpose; and it is intended that the judge should exercise those powers. No distinction exists between powers conferred by statute, and those existing at common law, unless a distinction is to be gathered from the terms of the statute. Many statutes might be pointed out which contain this distinction. Where a motion is to be made *in open court in term time*, it may be urged that the legislature contemplated that such authority should be confined to *the court*. This was so in the case of *Jones v. Fitzaddams*, 1 C. & M. 855, which was cited for the plaintiffs. The view I have been disposed to take, is this, that, where an authority is given to the court by an act of parliament, the court may exercise that power in the same manner as it may exercise any other powers, unless there be something in the act itself which imports that the power is conferred with a special limitation." And ALDERSON, B., says: "I take it to be clear, that, where the legislature gives the court any powers in general terms, and without any express limitation, it is the same as if those powers were given by the common law. The legislature is aware of the powers the court is accustomed to exercise: and, when *fresh powers are given [771 by the legislature, they are to be exercised in the usual and ordinary way. When, therefore, special limitations are intended to be imposed, the legislature express themselves to that effect. Several statutes have been referred to,(b) in which the legislature show that they

(a) Which authorizes *the court*, in actions concerning mortgages, upon the mortgagor's paying or bringing into court the principal and interest, by rule of court to compel the mortgagee to re-convey the premises, and to deliver up all deeds and evidences of title.

(b) 43 G. 3, c. 46, ss. 2 3· 48 G. 3, c. 123, s. 1; 1 & 2 W. 4, c. 58, s. 1.

do not intend to give the same authority to the judge at chambers as they do to the court *in banc*. Where, however, any power is given to the court in the usual way, the court may exercise it in the ordinary and usual way in which the court is accustomed to exercise its powers." [V. WILLIAMS, J. According to your argument, we may strike out of the statute the words, "or, in vacation, of any judge of either of the said courts."]

Ball, in support of the rule. The writ of summons, not being framed in conformity with the 2 W. 4, c. 39, sched. No. 1, is void: it is essential that the county of the defendant's residence should be named therein. The act of parliament assumes that the body of the writ is drawn by the officer of the court. The 10th rule of Michaelmas term, 3 W. 4, which speaks of omissions that may be ground of complaint for irregularity, but which do not avoid the process, has reference only to the memoranda and endorsements which are supposed to be the acts of the *plaintiff*. In *Richards v. Stuart*, 10 Bingh. 322, 3 M. & Scott, 774, this court discharged a defendant out of custody, on entering a common appearance, the writ of *capias* not describing the cause of action *strictly* according to the form prescribed by the statute 2 W. 4, c. 39, s. 4, sched. No. 4. [WILDE, C. J. Are all the subsequent authorities consistent with that?] *772] In *Garratt v. Hooper*, 1 Dowl. P. C. 28, *it was held, that, if a plea in abatement be a nullity, no act of the plaintiff apparently acquiescing in it, will be construed into a recognition of it. [WILDE, C. J. In *Child v. Marsh*, there was an incongruity in the process, and yet the court held it to be mere irregularity.]

The words of the statute expressly exclude the jurisdiction of the judge at chambers *in term time*. [CRESSWELL, J. It certainly is the uniform practice, in term time, to move for a *distringas* in court. *Fitzherbert*. That is so: but application for leave to enter an *appearance* are as frequently made at chambers as in court in term time; and the words of the act are the same as to both.] As to this point, *Ball* was stopped by the court.

WILDE, C. J. The words of the statute giving authority to the court or a judge to order the issuing of a *distringas* and the entering of an appearance, are precisely the same,—“if it shall be made appear to the satisfaction of the court out of which the process (or, writ of *distringas*) issued, or, in vacation, of any judge of either of the said courts,” &c., “it shall be lawful for such court or judge,” &c. And we should not be justified in giving a different construction to the same words in the same clause. The words are plain: the power of the judge in each case exists only in vacation; and no court appears ever to have sanctioned the issuing a *distringas* under an order made in term time by a judge at chambers. It is said that orders at chambers for entering an appearance on the return of a *distringas*, are of frequent occurrence. I am not aware of any such instance; and, at all events, none such has ever been brought before the court. There is nothing, therefore, to bind us to

adopt the practice, if it has inadvertently obtained. We must have recourse to *the words of the act. These we find to be distinct and plain, admitting of no doubt. We, therefore, think that the order of my brother MAULE for entering the appearance, was not warranted by the statute or the practice of the court, and that so much of the rule as seeks to set aside that order, must be made absolute. [*773]

The objection to the writ of summons fails in point of time. The writ is irregular in not mentioning the county in which the defendant's place of residence was situate. But that is an irregularity only; and that has been waived by a step taken after the defendant must be assumed to have had notice of the defect. It is a general rule of practice, founded upon strict justice, that, where parties have notice of objections which do not amount to a total avoidance of the process or proceedings, they must come promptly to complain, and at all events before the expiration of the time for taking the next step.

The rule, therefore, will be absolute, so far as relates to the order for entering an appearance, and discharged as to the rest.

Fitzherbert, for the plaintiff, submitted that the defendant should not have costs: for that, if the rule had been confined to setting aside the order for an appearance, the plaintiff would probably not have opposed it.

Per curiam. Let there be no costs on either side.

Rule accordingly.

*NEWTON v. CHAPLIN. April 18.

[*774]

A plaintiff is not entitled to move for costs of the day, unless he is present when the cause is called on.

ISSUE having been joined in this cause, and notice of trial given for the first sitting in Hilary term last, the defendant obtained a rule for a special jury. The special jury was accordingly nominated and reduced. The cause was called on in its order on the 9th of February, but, no special jurors being in attendance, it was struck out.

Newton, in person, upon an affidavit stating the above facts, now moved for costs of the day. He submitted that the defendant had been guilty of a default, in not procuring the attendance of a jury pursuant to the rule,—citing *Holt v. Meddowcroft*, 4 M. & Sel. 467, and *Hague v. Hall*, 5 M. & G. 693, 6 Scott, N. R. 705. [WILDE, C. J. The plaintiff might have obtained an office-copy of the process, and caused the jury to be summoned. The affidavit shows no default on the part of the defendant.] The plaintiff has no means of showing that the defendant neglected to deliver the *distringas* to the sheriff. [COLTMAN, J. You do not seem to have made any inquiry.] The court will hardly assume that the *distringas* was sent to the sheriff, and that he neglected his duty.

[WILDE, C. J. The court will assume nothing. Did the plaintiff appear at the time the cause was called on?] He did not: having received an intimation that no jury had been summoned, it was not thought necessary to attend. All his witnesses were there.

Per curiam,—To entitle him to make this motion, the plaintiff should at all events have appeared when the cause was called on for trial.

Rule refused.

*775] *FOLLETT and Others, Assignees of LESLEY ALEXANDER and WILLIAM BARDGETT, Bankrupts, v. DELANY. April 18.

The court will not, without special grounds, depart from the ordinary form of a commission for the examination of witnesses under the 1 W. 4, c. 22.

THIS was an action brought by the plaintiffs as assignees of Lesley Alexander & Co., bankrupts, to recover a large sum alleged to be due from the defendant to the plaintiffs as such assignees, for goods sold and delivered, goods bargained and sold, work and labour, commission, money paid, and money due upon an account stated before the bankruptcy.

On the 13th of February last, an order was made by CRESSWELL, J., upon the defendant's application, for a commission for the examination of Antonio Maserati and Joseph Barnes White, residing at Trieste, and other material and necessary witnesses on the part of the defendant. In pursuance of that order, the draft of a commission to Trieste was prepared as for the examination of witnesses on the part of the defendant only, and was served on the plaintiffs' attorneys on the 20th. On the 24th, the draft was returned, with the names of commissioners, and an authority for the examination of witnesses upon interrogatories and cross-interrogatories, on the part of the plaintiffs. The joint commission was issued on the 27th of March; but it contained no direction to the commissioners as to whether the witnesses on the part of the plaintiffs or on that of the defendant should be first examined. The interrogatories in chief and cross-interrogatories having been delivered, and the plaintiffs' attorneys having desired that the necessary directions to the commissioners as to the mode of executing the commission should be settled between the *parties before the same was sent out, the

*776] defendant's attorneys accordingly prepared and delivered to the plaintiffs' attorneys a draft containing, amongst other things, an instruction to the commissioners to begin with the examination of the *plaintiffs'* witnesses. The plaintiffs' attorneys declining to agree to this course, Clark, on the part of the defendant, now moved that the commission might be amended, by inserting therein a direction to the commissioners to begin with the examination of the plaintiffs' witnesses. [WILDE, C.

J. It is not usual to vary the form of the proceeding in the manner suggested.] The language of the act (a) evidently contemplates a variable form, according to circumstances.

WILDE, C. J. I see no reason for deviating in this case from the ordinary form of commission.

The rest of the court concurring,

Clark took nothing.

(a) 1 W. 4, c. 22, s. 4, which enacts, "that it shall be lawful to and for each of the superior courts at Westminster, &c., and the several judges thereof, in every action depending in such court, upon the application of any of the parties to such suit, to order the examination on oath, upon interrogatories or otherwise, before the master or prothonotary of the said court, or other person or persons to be named in such order, of any witnesses within the jurisdiction of the court where the action shall be depending, or to order a commission to issue for the examination of witnesses on oath, at any place or places out of such jurisdiction, by interrogatories or otherwise and by the same or any subsequent order or orders to give all such directions touching the time, place, and manner of such examination, as well within the jurisdiction of the court wherein the action shall be depending, as without, and all other matters and circumstances connected with such examinations, as may appear reasonable and just."

*PETER ROLT, JOSEPH OBBARD, and ALEXANDER BRYMER BELCHER, Assignees of WILLIAM WOOD, a [*777 Bankrupt, v. THE MAYOR, ALDERMEN, and BURGESSES of GRAVESEND. April 18.

On the 4th of February, 1840, judgment was signed against the defendants in an action of debt at the suit of A., B., and C., assignees of D., a bankrupt. C. (who was the official assignee under the *stat*) died in February, 1848. On the 4th of April, 1849, a writ of *elegit* was sued out at the suit of A., B., and C., without any *sci. fa.*, or suggestion of the death of C., or of the appointment of his successor,—who was stated in the affidavit to have been duly appointed the official assignee of the estate and effects of D. "on C.'s death :"—

Held, that the *elegit* was regular, in thus following the judgment; and that the affidavit was essentially defective, in not showing in precise terms that the appointment of the new assignee took place before the issuing of the *elegit*.

A WRIT of *elegit* having been issued in this case, endorsed to levy "1085*l.* 18*s.*, and 2*l.* 2*s.* for the writ, warrant, &c., and interest on 973*l.* at 5*l.* per cent. per annum from the 4th day of April, 1849, besides, &c.,"

Bramwell, on behalf of the defendants, moved to set aside the writ for irregularity. The affidavit upon which the motion was founded, stated, that, on the 11th of February, 1840, judgment was signed in this action; that the plaintiffs Rolt and Obbard are the creditors' assignees of the estate and effects of Wood, and that Belcher was, at the time of the signing of the said judgment, and up to the time of his death, as thereinafter stated, the official assignee of the estate of Wood; that Belcher died in February, 1848, and that, on his death, one Hatton Hamer Stansfeld was duly appointed the official assignee of the estate and effects of Wood in the place of Belcher, and is now the official assignee of the same estate and effects; that the debt and judgment in this action were and formed part of the estate of Wood, and that the plaintiffs sued in the capacity of assignees of the same estate; that, on or about the 4th of

*778] April, *1849, Her Majesty's writ of *elegit* was directed to W. M. Smith, Esq., the sheriff of the county of Kent; that, by virtue thereof, the said sheriff did, on the 4th of April, 1849, issue his warrant (a copy of which was annexed), directed to John Arnold, &c., the bailiffs of the said sheriff, commanding them to seize and take the goods and chattels, lands, tenements, and hereditaments of the above-named defendants, and to cause the same to be delivered to the said Peter Rolt, Joseph Obbard, and Alexander Brymer Belcher, as such assignees as aforesaid, to hold the said goods and chattels unto the said Peter Rolt, Joseph Obbard, and Alexander Brymer Belcher, assignees as aforesaid, as their proper goods and chattels, and to hold the said lands, tenements, and hereditaments respectively, according to the nature and tenure thereof, to them and their assigns; that, on the 10th of April, 1849, the said John Arnold, by virtue of the said warrant, and as such bailiff of the said sheriff, seized and took certain goods and chattels of the defendants, and remained in possession thereof; that no *scire facias* had been issued in this action, neither had any suggestion been entered on the roll, of the death of the said Alexander Brymer Belcher, or of the appointment of the said Hatton Hamer Stansfeld as aforesaid; and that the deponent had been unable to obtain a copy or inspection of the writ of *elegit*, but that he verily believed it was a writ commanding the sheriff to seize and take the goods and chattels, lands, tenements, and hereditaments of the defendants, and to deliver the same to the said Peter Rolt, Joseph Obbard, and Alexander Brymer Belcher.

The *elegit* is clearly irregular, without in some way noticing the death of Belcher and the appointment of Stansfeld as assignee in his place. [WILDE, C. J. It must follow the judgment.] There should have been a *779] *scire facias* or a suggestion. The only provision in the *bankrupt acts that tends to throw any light upon the subject, is, the 6 G. 4, c. 16, s. 67, which enacts, "that, whenever an assignee shall die, or a new assignee or assignees shall be chosen as aforesaid, no action at law or suit in equity shall be thereby abated, but the court in which any action or suit is depending, may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or new assignee or assignees to be substituted in the place of the former; (a) and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees, in the same manner as if he or they had originally commenced the same." But that does not exactly apply to this case, inasmuch as here there is no action *pending*. At common law, wherever a new party intervenes in any stage of the proceedings, his interest must in some way appear. In the notes to *Jefferson v. Morton*, 2 Wms. Saund. 6, n. (1), it is said, "that, where a new person, who was not a party to a judgment or recognisance, derives a benefit by, or becomes chargeable to, the execution, there must be a *scire facias* to make

(a) See *Westall v. Sturges*, 4 M. & P. 217; *Bates v. Sturges*, 7 B'n gh. 585, 5 M. & P. 568.

him a party to the judgment or recognisance.”(a) And in 2 Inst. 471, the rule is stated thus:—“One that is not party to the record, recognisance, fine, or judgment, as, the heir, executor, or administrator, though they be privy, and though it be within the year, shall have no writ of execution, but are to have a *scire facias* to enable themselves to the suit: so likewise of the tenant or defendant’s part, for, the alteration of person altereth the process; otherwise it is in case of a statute-staple, or *merchant, &c., because the process is given by other acts of [*780 parliament.” [WILDE, C. J. Your affidavit does not show when the new assignee was appointed: “on the death” of the former assignee, is too indefinite: it does not refer to the time of the appointment; it means no more than “in consequence, or by reason of the death.” A party who comes with a technical objection should himself be technically correct.] Even if there was no new assignee, the writ is irregular, for retaining the name of the deceased assignee. [V. WILLIAMS, J. Do you controvert the common doctrine, that, one of several plaintiffs dying after judgment, the execution may issue without a *scire facias*?] No. [WILDE, C. J. The death of one plaintiff does not affect the rights of the other two.] There being a new person interested, it is the same as if all the original plaintiffs had died, and new assignees had been appointed in their places. [COLTMAN, J. The judgment never was part of the estate and effects of the bankrupt.]

WILDE, C. J. I am of opinion that there is no ground for this application. The objection to the writ of *elegit*, is, that it is sued out in the names of the three plaintiffs, one of whom is dead. It is admitted, that, at common law, the judgment survives. In Tidd’s Practice,(b)—which has always been looked upon as a work of high authority,—I find the rule thus summed up: “It is now settled, that, when there are two or more plaintiffs or defendants in a personal action, and one or more of them die within a year after judgment, execution may be had for or against the survivors, without a *scire facias*.(c) But the execution *in such case should be taken out in the joint names of all the [*781 plaintiffs or defendants;(d) otherwise, it will not be warranted by the judgment.” That seems to me to be a distinct authority to show, that, so far as regards the death of Belcher, there is no irregularity in the form of the *elegit* in this case. Then, with respect to the appointment of the new assignee, Stansfeld, the affidavit is essentially defective: it shows an uncertain interval of time between the death of Belcher and the appointment of his successor, which, consistently with the affidavit, may have

(a) Citing *Pennoyer v. Brace*, 1 Ld. Raym. 244, 1 Salk. 319, 320, Carth. 404, Comb. 441; *The Queen v. Ford*, 2 Ld. Raym. 768.

(b) 9th edit., Vol. II, p. 1120.

(c) Citing *Isam’s case*, F. Moore, 367; *Anonymous*, Noy, 150; *Law v. Toothill*, Carter, 112, 193; *Pennoyer v. Brace*, *ubi supra*; *Brace v. Pennoyer*, 5 Mod. 338; *Howard v. Pitt*, 1 Show 402; *Withers v. Harris*, 3 Salk. 319, 7 Mod. 68, 1 Ld. Raym. 806.

(d) *Pennoyer v. Brace*, *ubi supra*.

taken place since the issuing of the execution. For anything that appears, therefore, the *elegit* in this case has issued according to the strict practice.

The rest of the court concurring,

Rule refused.

ENSOR v. GRIFFIN. April 21.

The court will not entertain a motion to discharge a rule for a *distringas*, on the ground of alleged misstatements in the affidavit upon which it was obtained.

T. JONES moved to discharge a rule for a *distringas*, on the ground that the affidavit upon which the rule was obtained misrepresented what took place upon the occasion of the calls at the defendant's supposed residence.

WILDE, C. J. We cannot allow the truth of an affidavit to be brought in question in this way.

The rest of the court concurring,

Rule refused.

*782] *SMITH v. THE LONDON, BRIGHTON, and SOUTH COAST RAILWAY COMPANY. May 2.

To a declaration in case against common carriers for the loss of a trunk containing certain articles of jewellery and female apparel, the defendants pleaded, as to part of the goods in the declaration mentioned, to wit, the said articles of jewellery, one of the said dresses, &c. &c., that, at the time of the delivery to them, they were contained in the trunk in the declaration mentioned; that they were so delivered to the defendants after the passing of the statute 11 G. 4 & 1 W. 4, c. 68 (the carriers' act); that the said goods consisted of articles and property of the descriptions following, or of some or one of such descriptions, that is to say, gold or silver in a manufactured or unmanufactured state, &c. (enumerating the several articles mentioned in the 1st section of the act), and that their value exceeded 10*l.*; that, at the time of the receipt of the goods by them, the defendants had duly affixed the notice required by s. 2 of the act; and that the plaintiff gave them no notice of the nature or value of the goods, nor did she pay or tender the increased rate of charge demandable under the act:—

Held, that the plea was bad, for not alleging with certainty that the articles in question were articles of some or one of the descriptions mentioned in the act.

The court refused to allow a plea to be amended after judgment pronounced thereon.

THE declaration stated that the defendants, before and at the time of the committing of the grievance thereafter mentioned, were common carriers of passengers and their luggage in and along a certain railway, by certain carriages of the defendants, from a certain place, to wit, from Brighton, to a certain other place, to wit, to London, for hire and reward to them the defendants in that behalf; that the plaintiff, theretofore, to wit, on the 25th of November, 1847, at the request of the defendants, became and was a passenger in one of their said carriages, to be by them safely and securely carried and conveyed thereby, together with her luggage, on a certain journey, to wit, from Brighton

aforesaid to London aforesaid, for certain rewards then paid by the plaintiff to the defendants in that behalf, and the defendants then received the plaintiff as such passenger as aforesaid, together with her luggage, to wit, a certain trunk of the plaintiff containing divers [*783 *goods, to wit, fifty articles of jewelry, fifty dresses, ten shawls, four fur cuffs, two boas, two mantles, fifty pieces of music, fifty pairs of gloves, fifty pairs of mittens, two fans, two porte-bouquets, fifty pocket-handkerchiefs, one hundred pieces of linen, one hundred yards of ribbon, one hundred yards of lace, twenty pairs of cuffs, one work-basket and contents, twenty aprons, two veils, twenty berthes, ten pairs of shoes, one Indian box, two bags, five Maltese chains, five other chains, one hundred books, twenty yards of silk, fifty bottles of *eau de Cologne*, one smelling-bottle, of the plaintiff, of great value, to wit, of the value of 100*l.*; that thereupon it became and was the duty of the defendants to use due and proper care that the plaintiff and her said luggage should be safely and securely carried and conveyed by and upon the said railway as aforesaid, from Brighton aforesaid to London aforesaid: Breach, that the defendants, not regarding their duty in that behalf, did not use due and proper care in and about the carriage and conveyance of the plaintiff's said luggage by and upon the said railway, from Brighton aforesaid to London aforesaid, but wholly neglected so to do, and then so carelessly and negligently conducted themselves with respect to the said luggage of the plaintiff upon the said occasion, that the same, by and through the carelessness and negligence and default of the defendants in that behalf, then became and was and remained wholly lost to the plaintiff, &c.

Pleas,—first, not guilty,—secondly, that the plaintiff was not a passenger, with her luggage, as alleged in the declaration.

Thirdly,—“and for a further plea, so far as relates to part of the said luggage and goods in the said declaration mentioned, to wit, the said articles of jewellery, one of the said dresses, the said fur cuffs, the said boas, *one of the said mantles, divers, to wit, twelve of the [*784 said pairs of mittens, the said ribbon, the said lace, two of the said aprons, one of the said veils, two of the said berthes, one of the said bags, four of the said chains, and the said silks of the plaintiff, in the said declaration respectively mentioned, the defendants say that the plaintiff ought not to maintain her aforesaid action thereof against them, because they say that the whole of the said several articles, goods, and chattels in the introductory part of this plea mentioned, at the time when they were delivered to and received by the defendants for the purpose in the declaration mentioned, were comprised and contained in the said trunk therein also mentioned, and together with the said trunk and divers other articles and things therein, formed one parcel; and that the said several articles, goods, and chattels in the introductory part of this plea mentioned, were so delivered to and received by the defendants, for the purpose aforesaid, after the passing of a certain act of parliament made and

passed, &c. [11 G. 4 & 1 W. 4, c. 68.(a)], intituled 'An act for the more *effectual protection of mail-contractors, stage-coach proprietors, *785] and other common carriers for hire, against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof;' and that, before and at the said time when the defendants so as aforesaid received the said articles, goods, and chattels in the introductory part of this plea mentioned, for the purpose aforesaid, they the defendants were common carriers of goods by land, for hire, by certain public conveyances, to wit, the said carriages of the defendants in the said declaration mentioned, in and upon the said railway, and from and to the said places therein in that behalf also mentioned, and that they the defendants so received the said last-mentioned articles, goods, and chattels, and the same were delivered to them, as such carriers, for the purpose aforesaid: And the defendants further say that the said last-mentioned articles, goods, and chattels, at the time of such delivery and receipt thereof, consisted of, and then were, articles and property of the descriptions following, *or of some or one of such descriptions*, that is to *786] say, gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, trinkets, gold or silver plate or plated articles, silks in a manufactured or unmanufactured state, furs, lace; and that the value thereof, then, and always since, exceeded the sum of 10*l.*: And the defendants further say, that, before the said time when they so received the said last-mentioned articles, goods, and chattels, for the purpose aforesaid, they the defendants had, in pursuance of and according to the said act of parliament, notified, by a notice affixed in legible characters, and which notice at that time remained and was affixed in such legible characters, in a public and conspicuous part of a certain railway-station at the said place, to wit, Brighton, in the declaration first

(a) The 1st section of which enacts that "no mail-contractors, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles of property of the descriptions following, that is to say, gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the Bank of England, Scotland and Ireland, respectively, or of any or other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire, or to accompany the person of any passenger, in any mail or stage-coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of 10*l.*, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail-contractor, stage coach proprietor, or other common-carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

And s. 2 enables the coach-proprietor, &c., to demand an increased rate of charge on any such packages; such increased rate to be specified in a notice affixed in the office or warehouse, &c.

mentioned (the same station before that time and then being a receiving-house where parcels and packages then were, and still are, received by them the defendants, as such carriers as aforesaid, for the purpose of conveyance, and also the receiving-house where the said last-mentioned articles, goods, and chattels were so received by them for the purpose aforesaid), an increased rate of charge demanded by them for the carriage of articles and property of the description above specified, exceeding the value of 10*l.*, and in which said notice were then and there stated and set forth, in such legible characters as aforesaid, the increased rates of charge required by them the defendants to be paid, over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of (amongst other things) valuable articles and things of any of the descriptions above mentioned and specified: And the defendants further say, that, at the time of the delivery to and receipt by them, for the purpose aforesaid, of the said trunk, with the contents thereof (such contents being, amongst other things, the said articles, goods, and chattels in the introductory part of this plea mentioned, which were **articles and property of some or one of* [787 10*l.*), neither the value nor nature of the said last-mentioned articles, goods, and chattels was then, or at any other time before the said alleged loss thereof, declared by the plaintiff, or by the person sending or delivering the same, to the defendants, or the person who received the same on their behalf, nor was the said increased rate of charge so notified by, and stated and set forth in, the said notice as aforesaid, or any increased rate of charge over and above the ordinary rate of carriage, or any engagement to pay the same, respectively, then, or at any other time, offered to or accepted by the defendants, or by the person receiving the same articles, goods, and chattels for the purpose aforesaid, or by any other person or persons on behalf of the defendants: And this the defendants are ready to verify; wherefore they pray judgment if the plaintiff ought to maintain her aforesaid action against them as to the premises in the introductory part of this plea mentioned."

The plaintiff demurred specially to the third plea, assigning for causes, —that the said last plea is uncertain, and does not certainly and positively show that the said articles, goods, and chattels, were articles and property of any descriptions in the said act of parliament mentioned; on the contrary, the said last plea describes the said articles, goods, and chattels argumentatively, alternately, hypothetically, and uncertainly, and states that they were gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, trinkets, gold or silver plate or plated articles, silks in a manufactured or unmanufactured state, furs, lace, and that they were of the said descriptions, *or of some or one of such descriptions*; and no certain issue can be taken on the said last plea; **and* [788 a verdict found in the language of the said last plea, as to the

description of the said articles, goods, and chattels, would be uncertain and bad; and, if the defendants' evidence is as uncertain as the statement in the said last plea, they will not be entitled to a verdict and judgment thereon;—and that the said last plea is also uncertain, in this, to wit, that it does not state or set forth the increased rate of charge demanded by the defendants; and, by reason of the said uncertainty, the plaintiff cannot tell whether the rate of charge paid by her was such increased rate of charge, and cannot safely reply to the said plea; and the increased rate of charge ought to be stated in the said last plea, to enable the court to judge whether the same was a reasonable rate of charge in that behalf. Joinder.

T. Jones, in support of the demurrer. (a) The third plea is clearly bad, for not alleging with certainty and precision that the articles enumerated in the declaration, were articles of some one of the descriptions mentioned in the statute, so that a certain issue might have been taken upon it. *789] In the *King v. Brereton*, 8 Mod. 330, *upon an information for a libel, it was objected "that the fact is laid very uncertain, for, it is that the defendant '*scripsit, fecit, et publicavit, seu scribi fecit, et publicari causavit,*' which is very uncertain, and no proper defence can be made, because it is in the disjunctive." (b) Sir *Philip Yorke* answered that "it is true, a man ought not to be punished where there is any uncertainty in the crime committed; but a disjunctive does not always make a different crime, but sometimes it is explanatory; (c) and therefore writing a libel, or causing it to be writ, is the same offence; and, if so, this information is good; it is like an indictment on the statute 5 Eliz. c. 4, that a man exercised *artem sive mysterium*, and that was held no fault. There is no uncertainty in the fact; for, to 'write or cause to be written,' is the same offence." But the court said: "'writing' and 'causing to be wrote,' are two different acts; there is no information like this. An indictment for erecting *cottagium sive tenementum* is ill. As to the indictment on 5 Eliz. c. 4, it is good, because that is not the charge. If the crimes were the same, yet the indictment ought to be certain." So, in *The King v. Morley*, 1 Y. & J. 221, an information stating that the defendant imported or caused to be imported foreign silks, was held bad for uncertainty. And in *Davy v. Baker*, 4 Burr.

(a) The points marked for argument on the part of the plaintiff, were,—first, "that the p. ea does not positively state that the goods and chattels as to which it is pleaded, were of any of the descriptions mentioned in the carriers' act, but states the description of the goods in the alternative;"—secondly, "that a plea stating a defence in the alternative is bad, because it appears thereby that the defendants' evidence is uncertain and alternative, upon which no positive or certain verdict can be given;"—thirdly, "that the plea does not state the increased rate of charge demanded by the defendants for carrying the goods in question;"—fourthly, "that the plaintiff cannot reply payment or tender of the increased rate of charge, without alleging and proving the amount of such increased rate of charge, which is a fact which ought to be pleaded and proved by the defendants."

(b) An indictment for a forcible entry into "two closes of meadow or pasture," is void for uncertainty: *The King v. Stocker*, 5 Mod. 138, 1 Salk. 342, 371.

(c) *Lambe's case*, F. Moore, 813.

2471, which was an action on the bribery act, 2 G. 2, c. 24, it was moved in arrest of judgment, that the charge was too loose and general—"that the defendant did receive a gift or reward;" without specifying *what* he received or took as a reward, whether *money* or what *particular species* of reward: to which *it was answered that "the declaration is in the *very words* of the act of parliament; and the charge [*790 is found by the jury to be true, 'that he did receive a gift or reward,' and is therefore within the act." But Lord MANSFIELD, and YATES, J., held that the declaration was clearly bad; for, the offence ought to have been laid with sufficient certainty, so as to be pleadable in bar of another action. In Stephen on Pleading (a) it is said,—and the rule is similarly laid down in Chitty on Pleading, (b)—"*Pleadings must not be hypothetical, or in the alternative.*" Thus, in an action of debt against a gaoler, for the escape of a prisoner, where the defendant pleaded, that, *if* the said prisoner did, at any time or times after the said commitment, &c., go at large, he so escaped without the knowledge of the defendant, and against his will; and that, *if* any such escape was made, the prisoner voluntarily returned into custody before the defendant knew of the escape, &c.,—the court held the plea bad; for, 'he cannot plead hypothetically, that, if there has been an escape, there has also been a return. He must either stand upon an averment that there has been no escape, or that there has been one, two, or ten escapes, after which the prisoner returned: Griffith v. Eyles, 1 Bos. & Pull. 413. So, where it was charged that the defendant wrote and published, *or* caused to be written and published, a certain libel, this was considered as bad for uncertainty:" The King v. Brereton, 8 Mod. 330.

• *Bramwell, contrd.* (c) The alternative condition of the several articles enumerated, is introduced by the *legislature for the purpose of [*791 obviating doubt. If the allegation here had been in the conjunctive, instead of the disjunctive, it would unquestionably have been good; and the plea would have been proved, if it had been shown that the trunk contained any one of the species of goods enumerated in the act. That is, in effect, giving the same force to the words as if they had been disjunctively alleged. The goods in question are stated to have been delivered to the defendants *in a trunk*. They could not know its contents: but the plaintiff did. It is a well known rule in pleading, that "no greater particularity is required than the nature of the thing pleaded will conveniently admit:" (d) and that (e) "less particularity is required

(a) 5th edit. p. 426, Rule IV.

(b) 7th edit. Vol. 1, p. 260.

(c) The defendant's points for argument were as follows:—"The defendants will contend that they are protected from liability by the carriers' act, 11 G. 4 & 1 W. 4, c. 68, if the goods enumerated in the last plea can be proved to be of any one of the descriptions specified in the act, and therefore that they have a right to plead in the form adopted; and that it is unnecessary to mention in the plea the increased rate of charge, because, the defendants having notified them to the public as required by the said act, the plaintiff must be taken to have had full knowledge of them, and was bound to take notice of them."

(d) Stephen on Pleading, 5th edit. p. 404.

(e) Ib. 407.

where the facts lie more in the knowledge of the opposite party, than of the party pleading." This rule is well illustrated by the case of *Gale v. Reed*, 8 East, 80. There, by indenture between A. and B. and C., dissolving their partnership as rope-makers, A. and B. covenanted to allow C., during his life, 2s. on every cwt. of cordage which they should make, on the recommendation of C., for any of his friends and connexions, and whose debts should turn out to be good; and that A. and B. should stand the risk of such debts incurred, but should not be compelled to furnish goods to any of C.'s connexions whom they should be disinclined to trust: and C. covenanted not to carry on the business of a rope-maker during his life (except on government contracts); and that *792] all debts contracted or to be contracted in his or *their names, pursuant to the indenture, should be the exclusive property of A. and B.; and that C. should, during his life, exclusively employ A. and B., and no other person, to make all the cordage ordered of him by or for his friends and connexions, on the terms aforesaid, and should not employ any other person to make any cordage, on any pretence whatsoever:—and it was held, that breaches assigned generally against C., for having made cordage for *divers persons* other than for government, and for employing *other persons* than A. and B. to make cordage for his friends, &c., were well assigned, though no particular persons were named, nor the quantities or kinds of cordage mentioned, &c.,—such facts lying more particularly within C.'s knowledge. [V. WILLIAMS, J. To have named all the parties in that case, would have rendered the plea obnoxious to the rule against prolixity in pleading.] That is not the ground upon which Lord ELLENBOROUGH puts it. He says: "The answer given by the plaintiffs' counsel,—viz. that, as the facts alleged in these breaches lie more properly in the knowledge of the defendant, who must be presumed conversant of his own dealings, than of the plaintiffs, there was no occasion to state them with more particularity,—is in our opinion a sufficient answer in point of law." [CRESSWELL, J. There was no difficulty in the way of making this plea more precise. The plaintiff having minutely described in her declaration all the articles for the loss of which she seeks compensation, the defendants had all the information they could need to make this a perfectly good plea. Probably they will amend.] The information in *The King v. Morley* stated in the alternative two descriptions of offence: that case, therefore, has no bearing upon the question. In truth, the expressions in this plea that are supposed to create uncertainty and ambiguity, are mere surplusage: and, *793] *the matter referred to lying more in the knowledge of the plaintiff than in that of the defendants, it is submitted that less particularity is required than would have been looked for under a different state of circumstances.

Jones, in reply. The defendants were bound to make out that the articles enumerated in the declaration fell within the description of goods

they were not bound to pay for, unless informed of their nature and value, and paid accordingly. The argument on the other side, if it amounts to anything, is, that the defendants were not bound to describe the goods at all. The rules cited from Stephen, pp. 404, 407, do not apply here. [CRESSWELL, J. Suppose the words "or some or one of them" had been omitted, or the word "respectively" inserted, would that have made the plea sufficient?] Probably it would. It may be that the rule upon which the question turns, is practically useless: but so are most of the rules of pleading.

WILDE, C. J. It appears to me that this case may be disposed of, without holding that the rule referred to is so useless as has been suggested. I must confess I very reluctantly give judgment against this plea. It is too uncertain. It ought to have been more specific.

Bramwell asked leave to amend.

WILDE, C. J. I am for adhering strictly to the general rule, not to allow an amendment after judgment.

CRESSWELL, J. If you had only taken the hint, when we paused to deliberate, you would perhaps have *been in time. But now, I [*794 agree with my lord in thinking that your prayer comes too late.

The rest of the court concurring, Judgment for the plaintiff.

DOE *d.* The Earl of CARDIGAN and Others, *v.* BYWATER.

April 28.

Attachment will not lie on a rule of court, unless for disobedience of some *express* direction.

An order was made *by consent*, in an action of ejectment, "that the proceedings be stayed, the defendant to pay his own costs of a former ejectment, and the lessor of the plaintiff to pay 5*l.* towards the defendant's costs, and to grant a lease of the premises for 21 years, at the rent of 1*l.* a year, on the same conditions as other parts of the estates of the lessor of the plaintiff in the parish, were held."

The defendant having declined to accept a lease and execute a counterpart,—the court refused to grant an attachment against him.

THIS was an action of ejectment brought to recover the possession of certain cottages, tenements, and premises situate in the parish of Batley, in the West Riding of the county of York. On the 10th of July, 1846, the following order was made by ERLE, J., in this cause:—

"Upon hearing the attorneys or agents on both sides, and *by consent*, I do order that the defendant withdraw the plea pleaded herein, and that all further proceedings herein be stayed,—the defendant to pay his own costs of the former action of ejectment, and the Earl of Cardigan to pay 5*l.* towards the defendant's costs of this action, and to grant a lease of the premises in question in the defendant's occupation, for twenty-one years from the 1st of July instant, at the rent of 1*l.* a year, on the same conditions as the other parts of the Earl of Cardigan's estate in the parish of Batley, in the county of York, are held."

*795] *This order having been made a rule of court,
F. Thompson, on the part of the lessors of the plaintiff, moved for an attachment against the defendant, for disobedience thereof. The affidavit upon which the motion was founded, stated, that, in April, 1847, a draft of a lease from the Earl of Cardigan to the defendant, of the cottages, tenements, and premises in question, in conformity with the terms of the order, was delivered to the defendant for perusal, and was returned on the 8th of September, 1848, by the defendant's solicitor, without objection; that, on the 18th of the same month, the sum of 5*l.* was paid, on behalf of the Earl of Cardigan, to the defendant's solicitor, towards the costs of the defendant, pursuant to the terms of the order; that the defendant was personally served with a copy of the rule; and that a lease of the cottages and premises, in conformity with the rule, duly executed by the Earl of Cardigan, was tendered to him, and he was required to execute a counterpart thereof; but that he refused so to do. [WILDE, C. J. The order contains no direction as to the acceptance of the lease by Bywater, and the execution of a counterpart.] It is necessarily implied. [WILDE, C. J. I am not aware of any case of an attachment for disobedience of an *implied* direction.] The lessors of the plaintiff have no other remedy. [WILDE, C. J. The order having been made *by consent*, cannot the bargain be enforced in equity?] Whether that be so or not, it is submitted that the party is subject to the summary jurisdiction of this court.

WILDE, C. J. I am of opinion that an attachment ought not to be granted in this case. I have always understood that an attachment for contempt goes only where the party has been called upon to do, and has
 *796] *wilfully omitted to do, some specific act. Such motions occur the most frequently in cases of awards. The direction contained in the award becomes, upon the award being made a rule of court, in effect, the direction of the court. But the court always takes especial care to see that the award is express and distinct in directing the particular matter to be done, before it will attach the party for disobedience of it. The same strictness is usually observed by the court, in enforcing performance of its own ordinary rules. The party, in the present case, is sought to be attached for not accepting a lease of certain premises, and executing a counterpart. Referring to the judge's order, I do not find that it directs him to do either of these things. It is said, that, although the order does not in terms direct the defendant to accept the lease and execute the counterpart, yet that this is necessarily to be implied. Looking at the whole rule, however, it seems to me that the granting of the lease by the Earl of Cardigan is a boon to the defendant, which the latter may be at liberty to decline. The ground of the motion, therefore, in my judgment, fails.

The rest of the court concurring,

Rule refused.

*EWBANK v. NUTTING and ORD. April 20. [*797

Trover lies against a ship-owner for a sale by the master of goods, at a place short of their port of destination, under circumstances not inconsistent with the general scope of the authority conferred upon the master by the owner.

A cargo of salt was shipped by the plaintiff at Liverpool, for Calcutta, under a bill of lading making the same deliverable to A. & Co., on payment of freight there, "as per charter-party." The ship sustained damage in quitting the harbour at Liverpool, and ultimately became so leaky that the master was compelled to run for Bahia, where, finding the state of the ship such as to render her incapable of continuing the voyage, and being unable to forward the salt to its destination, he sold it by public auction,—remitting the proceeds to his owner, who tendered the amount, after making deductions for general average and expenses to the plaintiffs:

Held, that the master and owner were jointly liable for the conversion;—that it was not necessary for the plaintiff to give the charter-party in evidence;—and that the jury were warranted in estimating the damages at the cost price of the salt and the sum which the plaintiff had paid on account of freight.

The two defendants severed in pleading, and appeared by different attorneys and different counsel, —*quære* whether each counsel was entitled to address the jury?

TROVER, for 1000 tons of salt, 1000 tons of stoved salt, 1000 tons of other salt, 1000 mats, 1000 tons of dunnage wood, and 1000 tons of other wood,—the count alleging for special damage that the plaintiff "not only lost and was deprived of the said goods and chattels, but lost and was deprived of the profits which he would otherwise have made of the said goods and chattels, and by the sale thereof in a certain place beyond seas, to wit, at Calcutta, to wit, to the amount of 2000*l.*, and also lost and was deprived of divers moneys which the plaintiff had paid and expended in and about the carrying and conveying of, and procuring the carrying and conveying of, the said goods and chattels from England unto and towards the said place beyond seas, &c.

The defendants, who appeared by different attorneys, severally pleaded,—first, as to parcel of the goods and chattels in the declaration mentioned, that is to say, as to two tons of the said dunnage wood in the *declaration mentioned, and as to so much of the declaration [*798 as related thereto, payment into court of 40*s.*, and no damages *ultra*,—secondly, as to the residue of the goods and chattels in the declaration mentioned, and as to so much of the declaration as related to the said residue, not guilty,—thirdly, as to the said residue, &c., not possessed,—fourthly, as to the said residue, &c., leave and license.

The plaintiff joined issue on the defendants' second and third pleas respectively, to the first replied damages *ultra*, and to the last *de injuria*.

The cause was tried before WILDE, C. J., at the sittings in London after last term. The facts were as follows:—The plaintiff is a merchant in London; the defendant Nutting is a ship-owner, and was, at the time of the transaction in question, sole owner of the ship Triton, of which the defendant Ord was master.

On the 3d of October, 1845, the plaintiff chartered the Triton to carry out to Calcutta a cargo of salt, and there take in a cargo of general merchandise for England. The salt in question,—the invoice price of

which was proved to be 471*l.* 6*s.* 9*d.*, was shipped under the following bill of lading:—

313 tons common } salt.
351 " stoved }

44 doz. mats } for dunnage.
989 feet of slabs }

"Shipped in good order and condition, by Leech, Harrison, & Forward, of Liverpool, in and upon the good ship or vessel called the Triton, whereof Ord is master for this present voyage, and now lying in the port of Liverpool, and bound for Calcutta, 313 tons of common, and 351 tons of stoved salt, loose, and in 400 sacks, 44 dozen mats, and a quantity of wood for dunnage, being marked and numbered as *per margin*; and to be delivered in the like good order and condition at the aforesaid port of Calcutta (the dangers and accidents of the seas and navigation, of whatsoever nature or kind, excepted), unto Messrs. Aylwin & Co., or to their assigns. *Freight for the said goods to be paid there as per charter-party.* In witness whereof, the master or purser of the said ship or vessel has affirmed to five bills of lading, all of this tenor and date, one of which being accomplished, the rest to stand void. Dated, in Liverpool, the 31st day of October, 1845.

"Weight unknown to

(Signed) "JOHN ORD."

*A bill was drawn by the defendant Nutting upon, and accepted *799] by, the plaintiff, for 254*l.* 10*s.* 8*d.*, being one-third of the outward freight; which bill was paid at maturity.

The Triton sailed from Liverpool on the 1st of November, 1845. On going out of the harbour, she ran foul of the abutment of the pier-head, and, a few hours after she got out to sea, it was discovered that she leaked so much that it was necessary to keep the pumps constantly going. A gale coming on, the captain bore up for Falmouth, but from stress of weather was unable to get in there. He then attempted to make Lisbon, but, not succeeding, he shaped his course for Bahia, where the vessel arrived on the 15th of December, on which day the captain addressed and sent the following letter to the plaintiff:—

"Barque Triton,

Bahia, Dec. 15, 1845.

"Sir,—I am extremely sorry that I cannot address you under more favourable circumstances. At the same time, I have much reason to be thankful that I am spared to do so; for, shortly after leaving the Channel, the Triton sprung a leak, when I should have put back, but was prevented by strong easterly winds: nor was it practicable to reach a port in Spain or Portugal, although the ship was at times making two feet *per* hour. We had several times nearly foundered. After reaching the latitude of Madeira, the weather became more settled, and the leaks decreased to eight and ten inches *per* hour, when I determined, if possible, to reach this port, in which I anchored last midnight, after a deal of hard pumping, and a passage of forty-three days. I shall have the necessary survey held as soon as possible. It will, no doubt, be necessary to lighten the ship, in order to ascertain what repairs will *800] required to enable her to proceed. You may rely upon my utmost endeavours for the general interest of all concerned. I shall advise you as early as possible of my further proceedings. In the interim, I beg to remain, &c.

(Signed)

"JOHN ORD."

This letter was received by the plaintiff on the 11th of March, 1846, which was after the sale of the cargo, as hereinafter mentioned.

On the day after the ship's arrival at Bahia, she was surveyed, when it was found necessary to lighten her, in order to ascertain the amount of damage she had sustained. Part of the cargo was accordingly taken out, and a second survey held on the 24th of December, when the vessel was reported unfit to carry a cargo of salt to Calcutta; and certain repairs were recommended, to enable her to return to Europe.

Several other surveys were held; and, in the result, it was judged advisable to abandon the voyage, to repair the ship, and to send her back to England with a cargo of light goods. Accordingly, the remainder of the salt was landed, and, on the 12th of February, 1846, sold by the direction of Ord, by public auction.

On the 17th of February, the captain wrote and sent to the plaintiff the following letter:—

“Barque Triton,

Bahia, Feb. 17, 1846.

“Dear Sir,—After having had the necessary surveys held on the Triton, I have, in conformity with the same, been obliged to abandon the voyage; and, having done so, it became my next duty to forward your cargo to its destination: but, there being no British vessels in port disengaged, I have not been able to do so; and, as, to store it, and await your instructions, or until a vessel could be procured, would at once be more than a total loss, as the expense, lighterage, landing, [*801 storing, and re-shipping, at some future period, would amount to at least 20*s. per* ton, I have, after most serious consideration, conceived it to be for the interest of whom it may concern, to sell the cargo at once by public auction; and which was accordingly done in presence of the vice-consul of this city, to the highest bidder. The gross proceeds of the sale will be about 13*s. per* ton; and, as soon as the account-sales are made out, I shall forward them to you. In this business, I have had a most unpleasant and difficult duty to perform. I have been compelled to act, or else abandon my post: but, having chosen the former, however unpleasant, and, being conscious of having faithfully discharged my duty for the general interest of all concerned, to the best of my judgment, I trust that I shall at least have credit for my good intentions, and doubt not but all concerned will be perfectly satisfied with the whole of my proceedings. I shall write by next conveyance. In the interim, I beg to remain, &c., (Signed) “JOHN ORD.”

“N. B. I was much surprised on turning out more than fifty tons of salt over and above the bill of lading. “J. O.”

On the 18th of the following month, the captain addressed and sent to the plaintiff the following letter, enclosing account-sales of the salt:—

“Barque Triton, March 18, 1846.

“Dear Sir,—I beg leave to remit you the enclosed copy of account-sales

of salt ex Triton. I hope to sail hence for your port on the 25th instant.
 *802] Trusting that on my arrival all matters relating to the above *will
 be brought to an amicable adjustment, I remain, &c.,

(Signed)

"JOHN ORD."

It appeared that the Triton, after having been repaired at Bahia, took on board a return cargo for London, by which she earned a considerable amount of freight. On her arrival, an average statement was made out on behalf of the owner, by which the plaintiff was declared liable to contribute towards a general average; and, after deducting the amount of that average, and the charges incurred in respect of the salt, a sum of 199*l.* 13*s.* 4*d.* only remained, which was tendered by Nutting to the plaintiff before the commencement of this action, and refused.

On the part of the plaintiff, it was insisted that the captain was not justified by the necessity of the case in selling the cargo; and that, when he found the vessel so leaky as to be incapable of performing the voyage, it was his duty to return to Liverpool, which it appeared that he might at first have done. And the tender of the alleged balance by Nutting, the owner, was relied on as a recognition of the acts of the captain, so as to make him a joint tort-feasor.

For the defendants it was objected that the plaintiff was bound to produce the charter-party, to show the terms upon which the cargo was to be carried. (a) This objection being overruled, it was contended, on the part of Nutting, that, the sale of the salt at Bahia not being justified by the circumstances, the captain had acted beyond the scope of his authority, and for this the owner was not responsible.

Byles, Serjt., for the defendant Ord, who insisted that the sale was justified by the circumstances in which the captain found himself at
 *803] Bahia, claimed to be *entitled to address the jury on his behalf,
 inasmuch as his defence was totally distinct and independent of that of the defendant Nutting.

The lord chief justice, however, refused to permit this: and he left it to the jury to say whether the conduct of the master, under the circumstances, amounted to a conversion, and whether his acts had been recognised and adopted by the owner; and he told them they might estimate the damages by the invoice price of the salt and the amount paid for freight.

The jury accordingly returned a verdict for the plaintiff, against both defendants, damages 725*l.* 17*s.* 5*d.*

Talfourd, Serjt., pursuant to leave reserved to him at the trial, now moved to enter a verdict for Nutting or for a new trial, on the ground of misdirection, and that the verdict was against evidence, there being no evidence to fix Nutting as a joint tort-feasor, and no proof of the terms of the dealing, inasmuch as the charter-party was not in evidence at the trial; and also on the ground that the jury had assessed the damages upon an erroneous principle.

(a) It was unstamped.

This action is brought for the wrong done by the captain in selling the cargo at Bahia, under circumstances which did not justify such a step. The owner is clearly not liable for an act done by the master entirely beyond the scope of his authority. To some purpose, the captain is agent of the owner of the goods, as well as of the owner of the vessel. In *Shipton v. Thornton*, 9 Ad. & E. 314, 1 P. & D. 216, it was doubted whether, where goods are shipped under a bill of lading in a general ship, which is prevented from completing the voyage in consequence of damage occasioned by tempest, the master is bound, if he has an opportunity, to forward the goods by some other conveyance to the place of destination: but it *was held, that, at any rate, he was at liberty [*804 to do so, by a conveyance equally cheap, if he should think fit; and that, if the goods arrive at the place of destination by such other conveyance, the master is entitled, on the freighter obtaining the goods, to the whole freight originally contracted for, though the freighter was named as consignee in the original bill of lading, and the bill of lading under which the goods are shipped by the second conveyance makes another party consignee, and though by the second conveyance the goods are carried for less than the freight originally contracted for. The owner is not responsible for the master's wrongful act. [WILDE, C. J. It is only when the captain does wrong that the owner *can* be liable.] Surely the owner is not responsible for a matter that is out of the contemplation of both parties. [WILDE, C. J. The law will in a certain event dissolve the relation between the owner of the ship and the captain: that is, where circumstances arise which by law make the captain the agent of the owner of the *goods*. Here, the jury have found that no circumstances existed to dissolve that relation, and therefore that the act of the master was the act of the owner.] The act of the captain in selling the cargo at Bahia being unjustified by any necessity, the owner was clearly not responsible for it as a tort-feasor. [COLTMAN, J. Does not the authority of the master extend to acts such as he, in the exercise of an honest judgment, thinks the best for the interest of the owner of both ship and goods?] It is submitted that he has no such unlimited discretion.

The tender of the proceeds of the sale was no adoption of the captain's wrongful act. Having received the money, the owner could not keep it. The tender was rather a repudiation than a recognition: *Wilson v. Tumman*, 6 M. & G. 236, 6 Scott, N. R. 894.

*It could only be upon some construction of the contract contained in the charter-party referred to in the bill of lading, that [*805 the defendant Nutting could be made a tort-feasor. The charter-party, therefore, ought to have been produced. [CRESWELL, J. The bill of lading states what was to be done with the goods: they were received, to be delivered in good order and condition at Calcutta, on payment of freight as per charter-party.] The bill of lading refers to the charter

party. [CRESSWELL, J. For one particular purpose. What right have you to import any of the terms of the charter-party into the bill of lading? WILDE, C. J. The bill of lading alone contains a perfect contract for the carriage of the salt. Suppose a carrier's servant sells goods that are intrusted to him, would not his master be responsible?] No doubt he would: but the relation between the parties in that case is totally different from that which exists here.

As to the damages, the proper question was, what was the value of the cargo at Bahia, under the then-existing circumstances. The way in which the jury were directed to consider that question clearly was not the proper mode of estimating the damages in an action of tort: it might have been different if this had been an action founded upon the contract to carry. [CRESSWELL, J. Suppose the conversion had been by throwing the cargo overboard, what would have been the measure of damage in that case? What would the cargo have been worth to the owner?] What it would have sold for at the port of destination, minus the freight. [CRESSWELL, J. May we not reasonably conclude that the goods would be worth the invoice price and the cost of carriage?] That might or might not be. [WILDE, C. J. It would not be more than an actual indemnity.]

*806] **Byles, Serjt.*, for the defendant Ord, adopting the arguments already urged on behalf of Nutting, presented the following additional ground for a new trial. The case of the captain was totally distinct and different from that of the owner. He was entitled to be heard. As between him and his owner, the question was whether he acted to the best of his skill and judgment. He was not bound to be infallible. It was exclusively a part of the captain's case, that the ship was so damaged at starting, as to be unseaworthy. [WILDE, C. J. How could the master justify selling the cargo, because he chose to sail in a ship that was not seaworthy? The whole of your case was discussed by my brother *Talfourd*.] In *Roscoe on Evidence*, 6th edit., p. 180, the rule is thus laid down:—"In an action for goods sold, in which the defendants appeared and pleaded non assumpsit by separate attorneys and counsel, but relied on the same defence, *viz.* payment, it was ruled by GIBBS, C. J., that the senior counsel could alone address the jury, and the witnesses were to be examined by the counsel successively, in the same manner as if the defence were joint, and not separate. 'It cannot be left in the power of defendants whose interests are the same, to make twenty cases out of one.' *Chippendale v. Masson*, 4 Campb. 174. And, in ejectment, where the defendants defended in the same right, but by different attorneys and counsel, Lord TENTERDEN ruled that only one counsel could address the jury: *Doe v. Tindal*, M. & M. 314. So, in trover, and a joint plea: *Per-ring v. Tucker*, M. & M. 392. So, in *Mason v. Ditchbourne*, 1 M. & Rob. 463, n., in debt on bond, plea *non est factum*, Lord ABINGER refused to allow two counsel to address the jury, for, 'there could not be a verdict for one and against the other defendant.' But, in an action *ex*

**delicto*, where defendants have pleaded and appeared by separate attorneys and counsel, a separate cross-examination and address [*807 have been permitted by ABBOTT, C. J.: *King v. Williamson*, 3 Stark. N. P. C. 162: and by TINDAL, C. J., *Massey v. Goyder*, 4 C. & P. 162, and *Southey v. Tuff*, C. P. sittings after T. T. 1834, MS.: and, even in *assumpsit*, under similar circumstances, the same course was allowed, and was approved of *in banc*: *Ridgway v. Philip*, 1 C. M. & R. 415; in which case, however, it appears by another report, 3 Dowl. P. C. 154, that one of the defences was, misjoinder of defendants as partners."

WILDE, C. J. My brother *Talfourd* has asked for a new trial in this case, on behalf of the defendant Nutting, upon three several grounds. My brother *Byles*, who appears for the defendant Ord, referring to these grounds, has urged a fourth, *viz.* that I improperly refused to allow him to address the jury.

1. This is an action of trover for the conversion of a cargo of salt, by selling it at Bahia, instead of carrying it to Calcutta, its port of destination,—the sale having taken place under circumstances which the jury found to be unjustifiable. On the part of the defendants, it is objected, that, inasmuch as the alleged conversion was in part made out by showing under what circumstances the goods came to the hands of the defendants, *viz.* under a bill of lading referring for the amount of freight to a charter-party entered into between the ship-owner and the freighter, the charter-party ought to have been produced,—not because the particular rate of freight could have any bearing on the question at issue in the cause, but because the charter-party might have contained some contract giving a *different character to the transaction. It is clear, however, that the bill of lading proved a perfectly good [*808 contract to carry the salt from Liverpool to Calcutta. It is not incident to any such contract that authority should be given to the ship-owner, or to the master, to deal with the goods in a manner clearly inconsistent with their safe conveyance to their place of destination, *viz.* to sell them elsewhere. The object of the contract simply was, the carriage of the goods from one place to another. If there had been any collateral contract modifying that disclosed by the bill of lading, the party who relied upon it might have produced it: it clearly was not necessary for the plaintiff to do so. I think the plaintiff produced all the evidence that was required to sustain the action, and consequently that the first ground of objection fails.

2. The second question is open to more consideration, though, when it comes to be considered, it does not strike me as presenting any very great difficulty. It is, whether the owner of the ship is liable for the conversion jointly with the captain. I do not say that the owner is liable for every conversion of which the master may be guilty: I desire to be understood as confining my attention to the facts of this particular case. The captain, acting *bond fide*, and meaning to execute the duties of his

employment of master, has been guilty of a mistake which in law amounts to a conversion. That which he did, he did as the servant or agent of the owner : and he was not less the agent of the owner, because, meaning to act *bond fide* in that character, he has fallen into a mistake. I think an act amounting to a conversion is, under such circumstances, a joint conversion by master and owner ; more particularly where, as here, the latter has done no act to repudiate or sever the relation. So far from having done so, he seems, as the jury have found, to have adopted the master's act. *That question was left to the jury ; and their finding upon it removes all doubt. I am clearly of opinion that this action is maintainable against both defendants.

With regard to the damages,—no evidence was given on the part of the defendants to control them. The only materials that were laid before the jury, were, proof of the cost price of the salt here, and of the sum paid by the plaintiff on account of freight. With this evidence before them, the question for the jury was, what was the amount of damage the plaintiff had sustained by the unauthorized sale of the salt at Bahia. They found that the value of the salt to the plaintiff at the time of the sale, was, the invoice price, and the freight paid for its carriage. I cannot say that they have done wrong. As far as the defendants are concerned, it meets the justice of the case : and, indeed, it hardly amounts to an indemnity to the plaintiff, for, he loses the interest of his money. The verdict certainly passed upon an understanding that no action would be brought upon the charter-party : I therefore think it should stand only upon the plaintiff's entering into an undertaking to that effect:

As to the point made by my brother *Byles* on behalf of the defendant Ord, although I entertain no doubt upon it, yet, as it is a point of such general interest, and I have no very distinct recollection of the authorities bearing upon it, I should like to take time to consider it.

COLTMAN, J. I am of opinion that it was not necessary for the plaintiff in this case to produce the charter-party. This is not like the ordinary case, where it comes out from the plaintiff's evidence that there is a contract in writing not produced. Here, a contract in writing embodying all the terms upon which the goods were to be carried, except *810] the rate of freight, *was produced. If, in order to sustain this action, it had been essential to ascertain the amount of freight agreed to be paid, it would have been necessary to produce the charter-party. Or, if the charter-party contained any collateral agreement which had any bearing upon the contract to carry, the defendants might have produced it.

As to the conversion, it appears to me, that, although the act of the master in disposing of the cargo at Bahia, was at variance with the authority given him by the owner of the cargo, it was not without the general scope of the authority conferred upon him by the owner of the

ship. The master is to act, in a case of sudden emergency and difficulty, according to the best of his judgment. The owner appoints the captain: and he is bound to choose a man of sound judgment and discretion.

With regard to the damages, I must confess I do not see that a more reasonable and equitable measure could have been adopted: and I think the justice of the case will be answered, if the plaintiff gives the undertaking suggested.

CRESSWELL, J. I am entirely of the same opinion. The bill of lading was the proper evidence of the delivery of the goods to the defendants for the purpose of being carried from Liverpool to Calcutta. The charter-party, if produced, would not have proved a contract to carry. And it was not essential to the plaintiff's case to show the rate of freight.

As to the master's discretion, I agree with my brother COLTMAN, that the owner gives the master a general discretion to act, in cases of emergency, in such a way as to bind him. Here, the master has exercised that discretion *bonâ fide*, but erroneously. I think both owner and master are responsible for the consequences.

*I also think the jury were well warranted in giving the damages [*811 they did. I do not very well see how else they could estimate the value of the goods to the shipper, than by taking the cost price, and adding thereto the expense incurred in getting them towards the merchant. What the cargo fetched by a forced sale at Bahia, clearly was no fair test. The plaintiff did not want the goods there.

V. WILLIAMS, J. I am of the same opinion. Without producing the charter-party, the plaintiff made out a perfect case against Ord. And, as soon as the relation of master and owner was made out between Ord and Nutting, the latter became liable for the act of the former. With respect to the damages, I entirely agree with the rest of the court.

Cur. adv. vult.

On a subsequent day, the lord chief justice intimated that the court were desirous of conferring with the rest of the judges upon the point reserved, before they decided upon granting a rule.

Byles, Serjt., in the following term, intimated to the court that he was instructed to abandon the additional point upon which he had asked for a rule on behalf of Ord. Consequently there was No rule.

*TARLETON v. SHINGLER. April 20. [*812

A bill at three months, drawn by A. and accepted by B., for A.'s accommodation, was endorsed and sent by post by A. to C. for value. C. returned the bill, insisting upon having one at two months instead. A. thereupon altered the bill, by making it payable at two instead of three months, and again sent it to C. There was no evidence that B. knew of the alteration at the time; but there was evidence to show that he subsequently assented to its being treated as a two months' bill.—Held, that the bill was well declared on as a two months' bill, and that it was not avoided by the alteration.

THIS was an action upon a bill of exchange, by endorsee against acceptor. The bill was declared on as a bill for 46*l.* 10*s.*, drawn on the 2d of October, 1847, by one Gourlay, payable *two* months after date, to Gourlay or order, endorsed by Gourlay, to one Gardner, and by Gardner to the plaintiff.

The defence was, that the bill had been altered in a material part after it was issued. (a) Gardner, who was called to explain the circumstances under which the alteration took place, made the following statement:—

Gourlay, the drawer, was a surgeon residing at Maidley, in Shropshire. The defendant was a tradesman at Iron Bridge, a few miles distant from Maidley. The witness, Gardner, was an apothecary residing in Birmingham. Gardner was the holder for value of a former bill, for the same amount as the bill in question, which had been accepted by the defendant, for Gourlay's accommodation, but which had not been paid at maturity. The bill declared on was drawn, accepted, and endorsed as a bill at *three* months' date, and sent by Gourlay to Gardner, in lieu of the former bill, by post. Gardner, having expected to receive an acceptance at *two* months, returned the bill to Gourlay, insisting upon having a bill at the *813] shorter date: and *in the course of a post or two he received the bill back altered to a *two* months' bill.

In order to show that the alteration had been assented to by the defendant, several letters were put in, in which he asked for time, and which treated the bill as a two months' bill.

COLTMAN, J., before whom the cause was tried at the last assizes at Stafford, left it to the jury to say whether the alteration had been assented to by the defendant, reserving to him leave to move to enter a nonsuit, in the event of the jury finding that question in the affirmative, on the ground that the stamp had already been exhausted.

The jury returned a verdict for the plaintiff, damages 1*s.*, the bill having been paid before the trial.

Talfourd, Serjt., in pursuance of the leave reserved to him, now moved to enter a nonsuit. The bill was a complete instrument before it was transmitted to Gardner, and the efficacy of the stamp exhausted: the subsequent alteration, therefore, was altogether inoperative. The only case that approaches this, is, *Downes v. Richardson*, 5 B. & Ald. 674. There, three persons joined as drawer, acceptor, and first endorser, in making an accommodation bill, which was afterwards issued for value to J. S. *Previously to its being so issued*, its date had been altered: and it was held, that, the acceptor having assented to the alteration when he was informed of it, it was no answer to an action against him on the bill, that the bill had been so altered without the consent of the drawer and first endorser; and that a fresh stamp was not necessary in consequence of such alteration, the bill having been altered *before it was issued in point*

(a) This defence was not specially pleaded. As to the necessity for so doing, see *Byles on Bills*, 5th edit. 243, 244, and the authorities there referred to.

of law, for, that an accommodation bill is not issued until it is in the hands of some person *who is entitled to treat it as a security [814 available in law. But, in that case, the alteration took place before the bill was issued; whereas, here, the bill had been endorsed and transmitted to a holder for value. [WILDE, C. J. Was it a complete bill,—a security available in law,—before Gardner agreed to take it?] It is submitted that it was a complete and valid instrument the moment it passed out of the hands of Gourlay.

WILDE, C. J. I think this is a very clear case. It was no more than if all the three,—Gourlay, Shingler, and Gardner,—had met, and, before the bill had passed out of the hands of the payee, the alteration had been made with the acceptor's assent.

The rest of the court concurring,

Rule refused.

TIMOTHY v. FARMER. April 20.

A plea of not possessed to an action of trespass, takes the case out of the jurisdiction of the new county-courts.

THIS was an action of trespass brought against the defendant, for, amongst other things, placing a ladder in the fore-court of and belonging to a messuage at Peckham, in the county of Surrey, in the plaintiff's occupation. The defendant pleaded not guilty and not possessed. And at the trial, at the last Surrey assizes, the plaintiff obtained a verdict for 40s., WIGHTMAN, J., the presiding judge, declining to certify.

Manning, Serjt., now moved for leave to enter a suggestion, under the 9 & 10 Vict. c. 95, to deprive the plaintiff of costs, on the ground that the action should have been brought by plaint in the *county-court. [815 [CRESWELL, J. Is not this within the proviso in s. 58, that the county court shall not have cognisance of any action in which the title to any corporeal or incorporeal hereditaments shall be in question?] The title was not *necessarily* in question here; and the affidavits show that in fact it *was* not brought in question at the trial. [CRESWELL, J. The defendant pleaded not possessed.] It will be a fearful penalty on the parties, if by pleading that plea, they are to be deprived of the benefit of the statute.

WILDE, C. J. By pleading not possessed, you put the plaintiff to proof of his title. How does he prove a trespass without proving his title?

The rest of the court concurring,

Rule refused.

BATHER v. BRAYNE and Another. April 21.

The court refused to set aside as frivolous, a demurrer to a replication to a plea of *liberum tenementum*, in trespass for mesne profits, setting up the judgment in ejectment by way of estoppel.

TRESPASS for mesne profits, after a recovery in ejectment. Plea, *liberum tenementum* in one of the defendants. Replication, setting up the judgment in ejectment by way of estoppel. To this replication, the defendants demurred.

Talfourd, Serjt., moved that the demurrer might be set aside as frivolous. He submitted, that, it having been distinctly settled, in *Aslin v. Parker*, 2 Burr. 665 (1 Smith's Leading Cases, 264), *Doe v. *816 Wright*, 10 Ad. & E. 763, 2 P. D. 672, and *Doe v. Huddart*, 2 C. M. & R. 316, 5 Tyrwh. 846, that the judgment in ejectment is an estoppel, the court would not now throw doubt upon those decisions by allowing the matter to be argued again. [CRESSWELL, J. *Doe v. Wright* was argued at very great length. If we decided the same way, and a writ of error were brought, it would be difficult to say that the writ of error was frivolous. I am far from wishing to throw a doubt on the case of *Doe v. Wright*. But the defendants have a right to have the matter put in a course for decision by a court of error.] If the court think the demurrer ought to stand, it may probably be allowed to stand for an early day.

WILDE, C. J. The decision in *Doe v. Wright* not having been affirmed in error, I think we ought not to deprive the defendants of the opportunity of questioning it by writ of error. We cannot say that the demurrer is altogether frivolous and without any pretence. Nor do I see anything in this case to warrant us in taking it out of the ordinary course.

The rest of the court concurring,

Rule refused.(a)

(a) See the argument of the demurrer, 8 Man. G. & S.

*817]

M'LEAN v. PHILLIPS. April 23.

Payment of money into court generally upon the whole declaration does not disentitle the defendant to the general costs of the cause, where he afterwards obtains judgment as in case of a nonsuit.

ASSUMPSIT, for goods sold and delivered, work and materials, and money due upon an account stated.

Plea, to the whole declaration, payment into court of 180*l.*, and no damages *ultra*.

Replication, damages *ultra*.

Issue was joined on the 7th of April, 1848, and, in the following Hilary term, the defendant obtained judgment as in case of a nonsuit, the plaintiff having failed to proceed to trial, pursuant to a peremptory under-

taking he had entered into to try at the sittings after Trinity term, 1848.

Upon the taxation of costs, the master allowed the plaintiff his full costs up to the time of taking the money out of court, setting them off against the defendant's subsequent costs.

Kingdon, on a former day in this term, obtained a rule calling upon the plaintiff to show cause why the master should not review his taxation. He insisted upon the authority of *Crosby v. Olorenshaw*, 2 M. & Sel. 335, and *Postle v. Beckington*, 6 Taunt. 158, that the defendant was entitled to his full costs from the commencement of the suit; and that, if the plaintiff was entitled to *any* costs at all, the utmost he could be entitled to would be, costs as upon an immaterial issue.

**Hance* now showed cause. The point has never been distinctly decided. By paying money into court, the defendant admits that [*818 the action was rightly brought. The policy of the law, therefore, clearly is, to give the plaintiff his costs up to that time. It was only in the further prosecution of the action that the plaintiff was wrong; and to that extent only should he be visited with costs. *Seamon v. Bridge*, 8 T. R. 408, and *Lorck v. Wright*, 8 T. R. 486, are distinct authorities to show that the plaintiff is entitled to costs up to the time of the payment into court.

Kingdon was not called upon to support his rule.

WILDE, C. J. If the plaintiff had terminated the cause in an early stage, he would undoubtedly have been entitled to costs up to the time of the payment into court. But, as he has not thought fit to adopt that course, and has allowed the defendant to obtain judgment as in case of a nonsuit, I think the latter is entitled to costs as if the cause had proceeded to trial, and he had obtained a verdict or a nonsuit. The rule for reviewing the taxation must, therefore, be made absolute.

The rest of the court concurring,

Rule absolute.

*WINN v. NICHOLSON. May 3.

[*819

By an order of reference made by consent, it was stipulated, amongst other things, that certain items in an account annexed to the order should be taken as admitted between the parties. The arbitrator having made his award,—the court refused to amend the order, and refer the matter back, upon affidavits showing a mistake by the clerk of the plaintiffs' attorney in the copying of one of the admitted items.

By an order made by consent at chambers, this cause and all matters in difference in a suit pending between the parties in Chancery, were referred to a barrister; and it was, amongst other things, provided, that, "upon the said reference, the said parties respectively shall admit before the said arbitrator, and the said arbitrator, upon the said reference, and in making his said award, shall take and receive, the account hereunto annexed, and marked A., to be a correct account and statement (except

as hereinafter is excepted) of the accounts between the said parties; and that the said arbitrator, in making his said award, shall (except as aforesaid) view and consider and award upon the rights and liabilities of either of the said parties with reference to the several items in the said account specified and set forth, in precisely the same manner as he would have done had the same been legally proved before him upon the said reference: provided, nevertheless, that the several items in the said account marked A. B. C. D. E. F. G. H. I. K. L. shall not be taken to be included in the said admission, nor shall the said arbitrator take or consider the same as admitted; and that it shall be open and admissible for the plaintiff in the said action to call upon the defendant for proof of, and to contend that the defendant is not entitled to recover or have credit in the said action or suit for, the said several items in the said account marked respectively F. G. H. I. K. L., and for the defendant in the said action to call upon the plaintiff for proof of, and to contend that the plaintiff is not entitled to recover or have credit in the said

*820] *action or suit for, the said several items in the said account marked respectively A. B. C. D. E.: and that, in case the validity of any award, or any such altered or amended or supplemental award, as are hereinafter mentioned, made by the said arbitrator, shall be disputed or impeached by either of the said parties, in the whole or in part, in any of Her Majesty's courts of law or equity, the same shall not be set aside, but the same shall from time to time be referred back by the court in which the same shall be so impeached, upon such terms as it shall think just and reasonable, to the said arbitrator, who shall thereupon, from time to time, within such time as the said court shall order, have power to alter or amend the said award, or to make a fresh or supplemental award, with or without hearing or receiving further or additional evidence: and the said award so altered or amended, and any fresh or supplemental award to be made as aforesaid, shall be deemed and taken as an award made under and by virtue of this order, and be binding upon the said parties respectively."

Among the items on the debtor's side of the account, were the two following:—

"1842. <i>Feb.</i> Balance of accounts for money received by	
the defendant for the plaintiff . . .	£758 2 8
"1843. <i>Feb.</i> Ditto ditto	460 11 4"

The clerk to the plaintiff's attorneys, in making a copy of the account to annex to the order of reference, by mistake inserted therein 460*l.* 11*s.* 4*d.* as the balance due in February, 1842, instead of 758*l.* 2*s.* 8*d.* And the arbitrator, when he made his award, acting upon the erroneous statement furnished to him, credited the plaintiff with the 460*l.* 11*s.* 4*d.*, instead of 758*l.* 2*s.* 8*d.*

*821] * *Wells*, upon an affidavit of these facts, moved for a rule to show cause why the order of reference and the accounts annexed thereto

should not be amended, and the award referred back to the arbitrator, for the purpose of correcting the error. [WILDE, C. J. What authority have you for that?] It must be conceded that there is no case exactly parallel in its circumstances with the present: but there are cases which afford a very close analogy to it. In *Price v. James*, 2 Dowl. P. C. 435, where the christian and surname of one of the parties were transposed by mistake in an order of reference, the court allowed it to be amended. *Pearman v. Carter*, 2 Chitt. Rep. 29, also shows that there may be cases in which the courts will grant this indulgence. [WILDE, C. J. The order in *Price v. James* purported to be made in a cause which did not exist, and the mistake was the act of the officer of the court. *Pearman v. Carter* is rather a strong authority against you.] In *Evans v. Senor*, 5 Taunt. 662, it was held that the court will amend an order of reference at *nisi prius*, made a rule of court, by inserting such omitted matters as are incident to the substance of the agreement between the parties. There, the parties had, by their respective counsel, agreed at *nisi prius* to enter into a rule of court, that the defendant should sell certain premises to the plaintiff at a valuation: an order of *nisi prius* was accordingly drawn up, but it contained no agreement that the defendant should make a good title to the premises, or execute any conveyance. The defendant afterwards disclaimed the agreement, and refused to make a title. A rule *nisi* was obtained to amend the order of *nisi prius*, by inserting the words "that the defendant should make a good title, and execute a conveyance of the premises." And GIBBS, C. J., *said: "We think the amend- [*822 ment may be made: the court are in possession of the order, by its having been made a rule of court. They cannot add anything which requires the consent of the parties; but they can add that which the parties in the legal effect of their contract assented to; and we do not think we make a very wide stretch of authority, in saying, that, if the rule is that the plaintiff shall become a purchaser of the premises upon payment of the price named, it involves the term that the vendor shall convey to him that for which he is to pay the money." [WILDE, C. J. That which was added there, was something that was essential to make the order of reference available at all. It has not much bearing upon this case: and I cannot help thinking there is a little inaccuracy in the report. The strongest case I remember is that of *Hall and Hinds, in re*, 2 M. & G. 847, 3 Scott, N. R. 250. There, certain disputes and differences between A. and B. were referred to the arbitrament of three merchants. A. admitted before the arbitrators that a sum of 143*l.* 15*s.* 11*d.* was due from him to B., but the latter claimed a larger sum; and the arbitrators found, that, in reality a *further* sum of 75*l.* 4*s.* 7*d.* was due from A. to B. Instead, however, of *adding* these two sums together, and directing A. to pay the aggregate amount to B., the arbitrators by mistake *deducted* the latter sum from the former, and, by a further mistake, *directed that B. should pay the difference to A.* Upon an affidavit of these facts by

two of the arbitrators (the third declining to join in the affidavit), the court set aside the award, on the ground that the arbitrators had evidently failed to express in the award the intention of their own minds, and that the mistake and act of carelessness were so gross as to amount, in the judicial sense of the term, to *misconduct* on the part of the arbitrators.] *That case was cited in *Phillips v. Evans*, 12 M. & W. 823] 309, but did not receive much approbation. In *Howett v. Clement*, 8 Scott, N. R. 851, an arbitrator having made an award in which the plaintiff was described by a wrong christian name, the court sent it back to him to correct,—the order of reference containing a clause for referring it back for amendment. The present case is certainly one in which the court would feel disposed to assist the party by an amendment, if at all consistent with precedent.

WILDE, C. J. It appears to me that the court has no power to accede to this application. No authority has been shown for it. The only case that is at all analogous, is that of *Evans v. Senor*; and that is very distinguishable. There, the defendant had entered into a rule of court whereby he contracted to sell certain premises to the plaintiff, and he afterwards refused to convey. An application was made to the court to amend the order of reference, by inserting therein words amounting to an undertaking on the defendant's part to convey. I observe that the remarks of Lord Chief Justice GIBBS are confined to so much of the application as relates to the execution of a conveyance. He says that the court "cannot add anything which requires the consent of the parties; but they can add that which the parties in the legal effect of their contract assented to: and we do not think we make a very wide stretch of authority, in saying, that, if the rule is that the plaintiff shall become a purchaser of the premises upon payment of the price named, it involves the term that the vendor shall convey to him that for which he is to pay the money." Nothing whatever is said about making title. The court thought they were only adding that which was already substantially *embodied in the order, or necessarily consequential to what was *824] expressed in it, and essential to render the order effectual. That which we are asked to do here, is altogether different: it is, to vary the order. The defendant agrees to refer an account containing an item by which he admits himself to be indebted in a sum of 460*l.* 11*s.* 4*d.* We are asked to vary that, by making him admit himself indebted in the sum of 758*l.* 2*s.* 8*d.* If this had been a reference by bond, it is quite clear that the court could not have interfered. Nor can we, I apprehend, on principle, interfere on this occasion. It is true that a court of equity, where the jurisdiction for the correction of mistake and fraud is very extensive, might, upon a proper state of facts, interfere to set aside the award. That, however, is not the application that is now before us: that which we are asked to do, is, not to set aside the award, but to alter

the contract into which the parties have entered. There is no warrant for such a proceeding. I therefore think there should be no rule.

COLTMAN, J. I should certainly have felt glad to afford the relief prayed, if any authority for so doing could have been produced. No case, however, has been found bearing any very near resemblance to this. No doubt, the court will correct the mistake of its own officer. In a case like this, there can be no relief but in a court of equity.

CRESSWELL, J. I am of the same opinion. I cannot help feeling surprised that advantage should be taken of such an error. But, at the same time, I feel that we have no power to assist the plaintiff.

V. WILLIAMS, J., concurred.

Rule refused.

HUDSON *v.* HASLAM. *May 6.*

[*825

In an action upon an agreement whereby, in consideration of the plaintiff's staying the proceedings in an action against J. S., the defendant promised to pay him a certain sum out of the proceeds of the sale of a chattel deposited with him by J. S. for that purpose, the declaration alleged that the plaintiff, relying upon the promise of the defendant, countermanded the notice of trial in the action against J. S., and stayed the proceedings:—

Held, that a plea, that, after the alleged countermand of notice of trial, the plaintiff further continued the proceedings against J. S., concluding with a special traverse, was an issuable plea.

Plea—that the plaintiff was not ready and willing to accept and receive the 40*l.* out of the purchase-money for the said picture, in manner and form, &c.:—Held, bad, as putting in issue an immaterial allegation.

THE declaration stated that the plaintiff, before and at the several times thereafter mentioned, was, and continued to be, an attorney of Her Majesty's superior courts of common law at Westminster; that the plaintiff, to wit, on, &c., was retained, as such attorney, by one Eliza Jung, to effect for her an arrangement with her creditors, and to do and perform for her other business as such attorney as aforesaid, and the plaintiff did then, to wit, on the day and year aforesaid, and on divers other days and times, do and perform, under the said retainer of the said Eliza Jung, and for her, and at her request, work and labour as such attorney as aforesaid, in and about the endeavouring to effect an arrangement with her said creditors, and also in and about other the affairs and business of the said Eliza Jung, and did then also find and provide, and use and apply in and about the said work and labour, certain materials and necessary things, at the like request of the said Eliza Jung, and did then also, under the said retainer, pay, lay out, and expend for the said Eliza Jung, and at her request, and for her benefit, divers moneys of him the plaintiff, for and in respect of which said several premises the plaintiff then reasonably deserved to have of the said Eliza Jung a certain sum of money, to wit, 85*l.* 1*s.* 11*d.*; that the plaintiff not having been paid any portion of the last-mentioned sum, or any money whatever, by the said Eliza Jung, and not having been in any manner paid or rewarded for his said

*826] work and labour, materials, *and advances, and not being able to obtain any payment, compensation, or reward whatever therefor from the said Eliza Jung, although repeated applications were made to her by the plaintiff in that behalf, he, the plaintiff, on the 27th of May, 1847, caused to be issued out of the court of our lady the Queen of the Bench a certain writ of summons, directed to the said Eliza Jung, in an action of debt, &c. The declaration then set out the proceedings in that action down to notice of trial, and averred, that the now defendant was, and during all the time aforesaid continued to be, an attorney of Her Majesty's superior courts of law at Westminster, and that he, the now defendant, did in fact act as, and was, the legal and professional adviser of the said Eliza Jung in and throughout the said proceedings of and in the said action so brought against her by the now plaintiff as aforesaid: that, the said action being and remaining so pending against the said Eliza Jung as aforesaid, and the said issue therein joined as aforesaid being so about to be tried at the said next assizes for the county of Surrey, as aforesaid, and the defendant, as such legal and professional adviser of the said Eliza Jung as aforesaid, to wit, on, &c., last aforesaid, and on divers other days and times before the day next hereinafter mentioned, having applied to and requested the plaintiff to stay the proceedings of and in the said action, and to come to a settlement of the same, he, the defendant, on those several occasions acting on the behalf of the said Eliza Jung, the said Eliza Jung, to wit, on the 27th of July, 1847, caused to be sent and delivered to the defendant a certain painting or picture of hers, in frame, accompanied by a certain letter written by her the said Eliza Jung, to the defendant, whereby she informed the defendant that that letter would accompany a painting of hers, in frame, being a copy of the celebrated Murillo, of "The *827] *Infant St. John and the Lamb," the original of which was in the National Gallery; that she had to request the defendant to use his best endeavours to find a purchaser for it at the price of forty guineas, or any sum beyond that, which he the defendant should think that she the said Eliza Jung ought to have for it, for, that she, the said Eliza Jung, was assured by good judges that she ought to have 50*l.* or 60*l.* for it; and that, if the said picture should be sold, the defendant should pay 40*l.* out of the purchase-money to the plaintiff, on her account; and that, in the meanwhile, the defendant should hold the said picture, not to be parted with to her the said Eliza Jung, or to any other person, except upon payment to the plaintiff of the said sum of 40*l.* or upon her the said Eliza Jung producing to the defendant the plaintiff's receipt for that amount; that she the said Eliza Jung sent the defendant a copy of that letter, and should feel much obliged if the defendant would do her the favour to write at the foot of such copy a few lines to the plaintiff, just to say that the picture above referred to had been by her the said Eliza Jung sent to the defendant, and that he the defendant

consented to hold the same upon the terms mentioned in the letter of which the above was a copy, and, in the event of a sale, would pay over such sum as above directed,—as by the said letter of the said Eliza Jung would appear. Averment, that the defendant, then to wit, on the day and year last aforesaid, accepted and received the said picture and letter into his possession, and thereupon, to wit, on the 28th of July, 1847, in pursuance of and in accordance and compliance with the said letter of the said Eliza Jung, and the said request therein in that behalf contained, the defendant wrote and addressed to the plaintiff a certain letter, in which he informed the plaintiff that he the defendant had received from the said Eliza Jung the said picture, and which he *con- [828
sented and agreed to hold upon the terms mentioned in the said letter of the said Eliza Jung to him the defendant,—of which letter he enclosed the plaintiff a copy,—until such time as a party, to be mutually agreed upon between the plaintiff and the defendant, could be met with, who would dispose thereof upon the terms mentioned in the said letter of the said Eliza Jung,—as by the said letter of the defendant would appear : that the plaintiff then, to wit, on the day and year last aforesaid, received the said letter so written and addressed to him by the defendant as aforesaid, and also the said copy of the said letter so written by the said Eliza Jung to the defendant as aforesaid : that thereupon, to wit, on the day and year last aforesaid, in consideration of the premises, and that the plaintiff, at the defendant's request, had then promised the defendant to accept, abide by, observe, and perform the terms and conditions in the defendant's said letter, and in the said letter of the said Eliza Jung, on his, the plaintiff's part to be accepted, abided by, observed, performed, and fulfilled, and would accept the said sum of 40*l*. out of the purchase-money of the said picture, when sold, in full satisfaction and discharge of his said claim and demand upon and against the said Eliza Jung, and also of the costs of the said action so by him commenced against her as aforesaid, and also that he the plaintiff would then forthwith countermand the said notice of trial of the said action so depending against the said Eliza Jung as aforesaid, the defendant then promised the plaintiff to observe, perform, and fulfil the said terms and conditions in his said letter to the plaintiff, and in the said letter of the said Eliza Jung to him the defendant, contained on his, the defendant's part to be observed, performed, and fulfilled ; that, although, after the making of the defendant's said promise, he, the plaintiff, relying upon the said promise *of the defendant, and confiding therein, did, to wit, on [829
the 29th of July, 1847, countermand his said notice of trial in the said action against the said Eliza Jung, and stayed the proceedings therein ; and although, after the making of the defendant's said promise, and before such time as a party, to be mutually agreed upon between the plaintiff and the defendant, could be met with, who would dispose of the said picture on the terms of the said letter of the said Eliza Jung, and

before the commencement of this suit, a reasonable time for the defendant to use his best endeavours to find a purchaser for the said picture, at the price of forty guineas, elapsed; and although *the plaintiff had always been ready and willing to accept and receive the said sum of 40l. out of the purchase-money thereof, in full satisfaction and discharge of his said claim and demand upon and against the said Eliza Jung, and of the said costs of the said action,*—whereof the defendant had continually had notice: yet the defendant, disregarding his said promise, did not nor would, within such reasonable time as aforesaid, use his best endeavours, or any endeavour whatever, to find a purchaser for the said picture, at the said price of forty guineas, or any other price whatever, but had wholly neglected and refused so to do; and although, after the making of the defendant's said promise, and within a reasonable time in that behalf, he, the plaintiff, was ready and willing to agree with the defendant upon a party who would dispose of the said picture upon the terms of the said letters and the defendant's said promise,—of which the defendant, within such reasonable time as last aforesaid, had due notice; and although the plaintiff did, within such reasonable time as last aforesaid, to wit, on the day and year last aforesaid, nominate and appoint certain persons, to wit, Messrs. Christie & Manson, of, &c., auctioneers, to dispose of the said picture, the *last-mentioned persons being fit and proper persons in
*830] that behalf, and ready and willing to dispose of the same,—of all which the defendant then had due notice, and was then requested by the plaintiff to agree upon the said persons so by him nominated and appointed as aforesaid; and although a reasonable time for his, the defendant's, so agreeing as last aforesaid, or himself nominating some other fit and proper person to dispose of the said picture according to the terms aforesaid, and his said promise, had elapsed before the commencement of this suit: yet the defendant did not nor would agree upon the said persons so by the plaintiff nominated and appointed as aforesaid to dispose of the said picture as aforesaid, nor did nor would the defendant nominate or appoint, nor had he nominated or appointed, any other person or persons whatever to dispose of the said picture, but had wholly neglected and refused so to do, and the said picture had, in consequence of the defendant's said breach of promise, remained, and still did remain, in the defendant's possession, undisposed of; whereby the plaintiff had not only lost the said sum of 40l. so to be paid to him out of the purchase-money of the said picture if and when the same had been so disposed of according to the defendant's said promise, but he, the plaintiff, had also, by reason of the premises, and of his relying upon and confiding in the defendant's said promise, been hindered and delayed in his said action against the said Eliza Jung, and had also been put to unnecessary costs, charges, and expenses in the said action, in and about countermanding the said notice of trial, and otherwise; and the plaintiff had also been unavoidably put to great costs, charges, and expenses, to wit, amounting

to 50*l.*, in and about performing his, the plaintiff's, part of the said terms and conditions in the said letters contained, and in and about performing, and endeavouring to perform, his *said promise, and also in and about endeavouring to compel the defendant to observe, [*831 fulfil, and perform his said promise, and otherwise in and about the premises, &c.

The defendant, who was under terms to plead issuably, pleaded, amongst other pleas, the following:—

That, after the making of the alleged agreement between the plaintiff and the defendant, and after the alleged countermand of notice of trial in the said action against the said Eliza Jung in the declaration mentioned, and whilst the said action was still pending and undetermined, the plaintiff further continued the proceedings in the said action against the said Eliza Jung, and then, to wit, on the 1st of March, 1848, gave a further notice of trial to the said Eliza Jung, of the said issue so joined in the said action, for the then next assizes to be holden at Kingston, in and for the county of Surrey; without this that the plaintiff stayed the proceedings in the said action, in manner and form as in the declaration alleged,—concluding to the country.

The plaintiff, treating this as a non-issuable plea, signed judgment.

Hugh Hill, on a former day in this term, obtained a rule nisi to set aside the judgment for irregularity.

Bovill now showed cause. The plea in question is a special traverse of the allegation in the declaration that the plaintiff stayed the proceedings in the action against Eliza Jung. There was no express stipulation on the plaintiff's part that the proceedings should be absolutely stayed: and, if any such stipulation was to be implied from the terms of the agreement, the staying the proceedings was not a condition precedent; the omission to stay them could only go to part of the consideration, and might possibly render the plaintiff *liable to a cross action. In [*832 *Stavers v. Curling*, 3 N. C. 355, 3 Scott, 740, it is said by this court, that "the rule has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the contract, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way. And one of the means of discovering such intention, has been laid down with great accuracy by Lord ELLENBOROUGH, in the case of *Richie v. Atkinson*, 10 East, 295, to be this,—'that, where mutual covenants go to the *whole* of the consideration on both sides, they are mutual conditions, the one precedent to the other; but, where the covenants go only to a *part*, there a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent.' " The defendant's liability to perform his agreement arose immediately on the coun-

term and of notice of trial in the action against Mrs. Jung. The alleged continuance of the proceedings by the plaintiff, might have been long after the breach of the undertaking by the present defendant.

Hugh Hill, in support of the rule. The plaintiff, in his declaration, alleges that he did stay the proceedings in the action against Eliza Jung. The declaration would clearly have been bad, unless it had expressly or impliedly alleged an absolute stay of the proceedings: staying the proceedings for an uncertain time, or for a little time, would be no consideration. The plea objected to is a mere traverse of that allegation. In *833] **Zulueta v. Miller*, 2 Man. Gr. & S. 895, it was held that a plea framed fairly to raise the question whether the action is not rendered unmaintainable by reason of the non-performance of an alleged condition precedent, is an issuable plea.

WILDE, C. J. The court is of opinion that the question raised by this plea is one which it is competent to the defendant to raise upon the record, and that, the plaintiff was not justified in treating it as a non-issuable plea, and signing judgment as for want of a plea. It is not a plea that is palpably pleaded for delay, or without pretence. We, however, offer no opinion as to the validity of the plea. The rule for setting aside the judgment must be made absolute, the costs being costs in the cause.

Rule absolute accordingly.

June 19.

The above plea was afterwards withdrawn, under a judge's order, and the following plea substituted:—

“And, for a further plea in this behalf as to the breach of promise first above assigned, the defendant says that the plaintiff was not ready and willing to accept and receive the said sum of 40*l.* out of the purchase-money for the said picture, in manner and form as in the declaration is alleged; and of this the defendant puts himself upon the country.”

The plaintiff demurred specially to this plea, assigning for causes, amongst others, that it traversed an immaterial allegation of the declaration; that the plaintiff's readiness and willingness to accept the sum of 40*l.* out of the purchase-money of the said picture formed no condition *834] precedent or concurrent to the *performance by the defendant of his express promise to use his best endeavours to find a purchaser for the said picture; that, until the purchase-money of the said picture was realized, the plaintiff's readiness and willingness to accept the said sum of 40*l.* out of it, was a state of things which could not exist, since the plaintiff could not be ready and willing to accept 40*l.* out of a non-existing sum, and an inquiry into the plaintiff's state of mind on the subject was wholly beside the question; and that the plea traversed only a part of the consideration for the defendant's promise.

The defendant joined in demurrer; and the argument took place as

the sittings after Trinity term, 1849, before MAULE, J., CRESSWELL, J., and V. WILLIAMS, J.

Needham, in support of the demurrer. The plea traverses an allegation that is totally immaterial. Until the picture was sold, there was no duty on the defendant to pay, or upon the plaintiff to receive, the stipulated sum. The declaration would have been perfectly good without the averment of readiness and willingness. Thus, in *Wilks v. Smith*, 10 M. & W. 355, 2 Dowl. N. S. 215, a declaration alleging, that, by an agreement made between the plaintiff and the defendant, the plaintiff agreed to sell, and the defendant to buy, certain building ground, for the sum of 120*l.*, which the defendant agreed to pay the plaintiff on or before the expiration of four years, with interest at 5*l. per cent.* half-yearly until paid, and averring that the four years had not expired, that the 120*l.* had not been paid, and that 12*l.* had become due for interest,—was held good, for, that the plaintiff was not bound to aver that he had delivered possession of the land, or that he had title to the land, or was ready *and willing to convey it: “It is enough,” said PARKE, B., “if he is ready and able to convey at the time when the title [835 is to be made out.” So, here, it was enough if the plaintiff was ready and willing to receive the 40*l.* when the defendant had put himself in a position to pay it and had actually offered it. The acceptance by the plaintiff of the 40*l.* is a condition subsequent, the performance of which need not be averred: *Comyns’s Digest*, title *Pleader*, (C. 51.)—(C. 55). *Lacy v. Lacy*, Cro. Eliz. 249, very closely resembles the present case. There, the plaintiff declared in *assumpsit*, that whereas the defendant was possessed of a lease for years, the reversion to the Queen, in consideration of 10*l.* paid by the plaintiff to him in hand, and of 10*l.* to be paid to him upon the procuring of a new lease to the plaintiff, the defendant did promise to surrender his lease, and to procure a new lease to the plaintiff before the end of Trinity term: and that he had not performed it. Upon non *assumpsit* pleaded, it was found for the plaintiff. And it was said, in arrest of judgment, that the declaration was not good, “because he did not allege he was ready to pay the other 10*l.* at the end of Trinity term. *Sed non allocatur*; for, it was not to be paid till the defendant procured the lease, so he was to do the first act.” And the plaintiff had judgment. In *Giles v. Giles*, 9 Q. B. 164, the declaration stated, that, by agreement between the plaintiff and defendant, two brothers, the defendant, in consideration of natural affection, and for other considerations him moving, agreed to permit the plaintiff to occupy lands of the defendant to the 29th of September, the plaintiff paying a sum named as rent on that day, as he thereby agreed to do, and then to deliver up the premises to the defendant; and, upon *the plaintiff so quitting the premises, paying the rent, and re- [836 leasing the defendant from all claims under their father’s will, and quitting claim to all lands which were of the father,—which the

plaintiff agreed to do,—the defendant would pay the plaintiff 200*l.*, with interest from the 29th of September: and it was agreed that all deeds and releases to be required by defendant, should be prepared by his attorney at his expense. The declaration, after averring mutual promises, alleged that the plaintiff, on the 29th of September, was ready and willing to deliver up the premises to the defendant, and to pay the rent, and was at all times from the making of the agreement *ready and willing to release*, &c.; and that, although the 29th of September, and a reasonable time from thence for the payment of the 200*l.* had elapsed, and no release was prepared by the defendant's attorney, the defendant had not paid the 200*l.* with interest. And a plea traversing *the plaintiff's readiness and willingness to release*, was held bad on special demurrer. [V. WILLIAMS, J. It is laying it down too broadly to say that readiness and willingness need not be averred, where the first act is to be done by the other party.] Readiness and willingness is immaterial, until such time as the duty of performing the act is cast upon the party.

Farrer, contra. The plea is good. The allegation traversed by it, is a continuously concurrent condition. The defendant is in the situation of a trustee. He undertakes to keep the picture, and to use his best endeavours to find a purchaser for it, paying to the plaintiff 40*l.* out of the purchase-money. The readiness and willingness of the plaintiff to receive the 40*l.* was important, in this, that, if he did any act to show that he would not accept the 40*l.* if offered to him, he would thereby discharge *837] the defendant from the *performance of his part of the contract.

Suppose, for instance, he had given the defendant notice that he was going on with the action against Eliza Jung, that clearly would have discharged the defendant. If any state of things may be assumed in which the plaintiff's readiness and willingness to receive the 40*l.* might be material, the plea is a good one. The defendant is not the person to do the first act. The plaintiff is to countermand the notice of trial, and stay the proceedings, before any act is to be done by the defendant.

Needham was not heard in reply.

MAULE, J. This is a decidedly bad plea. The declaration alleges that the plaintiff undertook to use his best endeavours to find a purchaser for a certain picture which had been deposited with him, and to pay to the plaintiff 40*l.* out of the purchase-money, in discharge of certain claims which the plaintiff had against one Eliza Jung; and it then avers that the plaintiff performed the agreement in all things on his part to be performed, and that he had always been ready and willing to accept and receive the said sum of 40*l.* out of the purchase-money of the picture in full satisfaction and discharge of his said claim and demand upon and against the said Eliza Jung; and assigned for breach, that the defendant did not use his best or any endeavours to find a purchaser for the picture. The plea traverses the allegation of the plaintiff's readiness and willingness to receive the 40*l.*: and the question is whether that is a material

and traversable allegation. I am clearly of opinion that it is not. By the terms of the agreement, there are two acts to be done by the defendant, *viz.* the sale of the picture, and the payment of 40*l.* to the plaintiff. All that the plaintiff is to do, is, to receive the money when offered to him. He unnecessarily **avens* in his declaration, that, if the **838* money had been forthcoming, he would have accepted it. That is a mere allegation of something that is floating in his mind. His readiness and willingness to receive the money could not be material until it was offered to him. Whether he was ready and willing, or not, the duty of the defendant was still the same. The plaintiff might have accepted the money when offered, however unwilling he might have been before. The allegation was an idle one, and not a fit subject for a traverse.

CRESSWELL, J., and V. WILLIAMS, J., concurring,

Judgment for the plaintiff.

RICHARDS v. THE LONDON, BRIGHTON, and SOUTH COAST RAILWAY. May 6. **839

Where a railway company employ porters at their stations to convey passengers' luggage from the railway carriages to the carriages or hired vehicles of the passengers, the liability of the company as carriers continues until the porters have discharged their duty.

In case against a railway company for the loss of a package, the first count of the declaration stated that the defendants were the owners and proprietors of a railway for the carriage and conveyance of passengers and their luggage, &c., from A. to B., for hire; that the defendants were common carriers for hire in and upon the said railway; that the wife of the plaintiff, at their request, became a passenger in and upon the railway, to be carried and conveyed therein and thereby from A. to B., together with her luggage, consisting of a dressing-case, &c., also to be carried and conveyed by the defendants as such carriers in and upon the railway from A. to B., and there, to wit, at the station or terminus at B., safely and securely delivered for the plaintiff, for reasonable reward to the defendants in that behalf: and the breach alleged was, that the defendants, not regarding their duty, did not use due and proper care in and about the carriage and conveyance of the dressing-case from A. to B., but took so little and such bad care in and about the carrying and conveying the same, that, by and through the *carelessness, negligence, and improper conduct* of the defendants in the premises, the dressing-case was lost.

It was proved that the plaintiff's wife became a passenger by a first-class carriage, to be conveyed from A. to B.; that the dressing-case was placed in the carriage, under the seat; that, on the arrival of the train at B., the porters of the company took upon themselves the duty of carrying the lady's luggage from the railway-carriage to the hackney-carriage which was to convey her to her residence; and that, on her arrival there, the dressing-case was missing:—

Held, that the duty of the defendants as common carriers continued until the luggage was placed in the hackney-carriage; and that the evidence entitled the plaintiff to a verdict upon the first count.

THIS was an action upon the case against The London, Brighton, and South Coast Railway Company for the loss of a dressing-case containing certain articles of jewellery belonging to the plaintiff.

The first count of the declaration stated that the defendants, before and at the time of the delivery of the dressing-case, goods, and chattels to them, and the committing of the grievances as thereafter next mentioned, were the owners and proprietors of a certain railway, to wit, a

*840] railway from a certain place or *railway station called Woodgate Station, in the county of Sussex, to a certain railway station or terminus of the defendants in the borough of Southwark, in the county of Surrey, and of certain engines and carriages used by them for the carriage and conveyance therein and thereon of passengers and their luggage, and of goods and chattels, in, upon, and along the said railway from Woodgate Station aforesaid to the said station or terminus at Southwark aforesaid, and from the said station or terminus at Southwark aforesaid to Woodgate Station aforesaid, for hire and reward to them the defendants in that behalf, and the defendants were during all the time aforesaid common carriers for hire in and upon the railway aforesaid, and between the places aforesaid; that the defendants being such owners and proprietors as aforesaid of the said railway, and the said engines and carriages, for the purpose aforesaid, and such common carriers as aforesaid, theretofore, and before the commencement of this suit, to wit, on the 10th of November, 1846, one Charlotte Susanna Richards, the wife of the plaintiff, at the request of the defendants, became and was a passenger in, upon, and along the said railway of the defendants, and the defendants then received into one of their said carriages in and upon their said railway the said Charlotte Susanna, as a passenger in, upon, and along the said railway, to be carried and conveyed therein and thereby from Woodgate Station aforesaid, to the said station or terminus at Southwark aforesaid, together with the luggage, consisting of a certain dressing-case, and certain other goods and chattels of the plaintiff, to wit, 100 rings, 100 broaches, 10 watches, 10 chains, 20 seals, 50 ear-rings, 20 necklaces, 20 bracelets, 100 studs, 100 buttons, 20 buckles, 20 trinkets, and 100 other articles of jewellery, of great value, to wit, of the value of 200*l.*, also to be carried and conveyed by the defendants, as such carriers as aforesaid, *in, upon, *841] and along the said railway from Woodgate Station aforesaid, to the said station or terminus at Southwark aforesaid, and there, to wit, at the said station or terminus at Southwark aforesaid, safely and securely to be delivered for the plaintiff, for reasonable reward to the defendants in that behalf. Yet that the defendants, not regarding their duty in that behalf, did not use due and proper care in and about the carriage and conveyance of the said dressing-case, goods, and chattels of the plaintiff from Woodgate Station aforesaid to the said station or terminus at Southwark aforesaid, but took so little and such bad care in and about the carrying and conveying of the said dressing-case, goods, and chattels, that, by and through the carelessness, negligence, and improper conduct of the defendants in the premises, the said dressing-case, goods, and chattels, being of the value aforesaid, then became and were wholly lost to the plaintiff.

The second count stated, that the defendants, theretofore, and before and at the time of the delivery to them of the dressing-case, goods, and

chattels in that count mentioned, and of the committing of the grievances as thereafter next mentioned, were the owners and proprietors of a certain railway, railway-station, offices, and buildings, in the borough of Southwark and county of Surrey, and of certain engines and carriages used by them for the carriage and conveyance of passengers, goods, and chattels, in, upon, and along their said railway, called The London, Brighton, and South Coast Railway, which said railway terminated at one end thereof at the station aforesaid; that the defendants were during all the time aforesaid common carriers for hire from all parts of their said railway to that or those part or parts of their said station, offices and buildings where hackney cabs and carriages are used and accustomed, by the license and permission of the defendants, *to come and [*842 ply for hire; that the defendants, being such common carriers as aforesaid, theretofore, and before the commencement of this suit, to wit, on the 10th of November, 1846, then received and accepted as such carriers of and from the plaintiff, and the plaintiff then delivered to the defendants as such common carriers as aforesaid, a certain dressing-case and certain other goods and chattels of the plaintiff, to wit, of the like number, quantity, quality, and description as the said goods and chattels in the said first count mentioned, and of great value, to wit, of the value of 200*l.*, to be safely and securely carried and conveyed by them the defendants, as such carriers, from a certain carriage of the defendants, then being in and upon their said railway, and at the terminus of the said railway, and within the said station, offices, and buildings to a certain other part of the said station, offices, and buildings, being the part of the said station where hackney cabs and carriages were so used and accustomed as aforesaid to come and ply as aforesaid, and to a certain hackney-carriage then and there plying and being within the said station, offices, and buildings, by the leave, license, and permission of the defendants, and then and there engaged and hired for and by the plaintiff, and then and there, to wit, at the said other last-mentioned part of the said station, and at the said hackney-carriage there being, to be safely and securely delivered for the plaintiff: yet that the defendants, disregarding their duty in that behalf, did not use due or proper diligence and care in and about the said carrying, conveying, and delivering the said dressing-case, goods, and chattels of the plaintiff in that count mentioned, but, on the contrary thereof, took so little and such bad care in and about the said carrying, conveying, and delivering the said last-mentioned dressing-case, goods, and chattels of and for the plaintiff, that, by and through the *carelessness, negligence, and improper conduct [*843 of the defendants in the premises, the said last-mentioned dressing-case, goods, and chattels, being of the value aforesaid, then became and were wholly lost to the plaintiff.

The third count stated that the plaintiff, at the request of the defend-

ants, theretofore, and before the commencement of this suit, to wit, on the 10th of November, 1846, caused to be delivered to the defendants, and the defendants then accepted and received of and from the plaintiff, a certain dressing-case and certain other goods and chattels of the plaintiff, to wit, of the like number, quantity, quality, and description as the goods and chattels in the first count mentioned, and of great value, to wit, of the value of 200*l.*, to be taken care of, and carried and conveyed by the defendants from a certain carriage of the defendants at the terminus of the said railway, and within the precincts of a certain railway-station of the defendants, situate and being in the borough of Southwark and county of Surrey, to a certain hackney-carriage then and there being and plying for hire, in another part, and within the precincts of the said station, by and with the permission and license of the defendants, and there, to wit, at the hackney-carriage aforesaid, to be safely and securely delivered by the defendants for the plaintiff; that thereupon it then became and was the duty of the defendants to take due and reasonable care of the said last-mentioned dressing-case, goods, and chattels, whilst they so had charge thereof for the purpose aforesaid, and to take due and reasonable care in and about the carrying, conveying, and delivering thereof as aforesaid: yet that the defendants, not regarding their duty in that behalf, did not take due or reasonable care of the said dressing-case, goods, and chattels in that count mentioned, whilst they had the charge thereof for the purposes aforesaid, nor did they take due or *844] *reasonable care in and about the conveyance and delivery thereof as aforesaid, but, on the contrary thereof, the defendants, whilst they had the charge of the said dressing-case, goods, and chattels in that count mentioned, for the purposes aforesaid, took so little and such bad and improper care of the said dressing-case, goods, and chattels in that count mentioned, and such bad and unreasonable care in and about the carriage, conveyance, and delivery of the same as aforesaid, and so carelessly and negligently conducted themselves in the premises, that the said dressing-case, goods, and chattels in that count mentioned, being of the value aforesaid, became and were wholly lost to the plaintiff,—to the damage of the plaintiff of 200*l.*, &c.

The defendants pleaded,—first, not guilty, to the whole declaration.

Secondly,—to the first count,—that they were not the owners or proprietors of the said railway, engines, or carriages, or common carriers for hire, as in that count was alleged; concluding to the country.

Thirdly,—to the first count,—that the said Charlotte Susanna Richards did not become, nor was she, nor did the defendants receive her, as such passenger as in that count was mentioned, together with her said luggage, consisting of the said dressing-case and other goods and chattels therein also mentioned, or any part thereof, to be respectively carried or conveyed or delivered as therein was alleged; concluding to the country.

Fourthly,—to the first count, except so far as related to the dressing

case therein mentioned,—that the whole of the said other goods and chattels of the plaintiff therein mentioned, at the time they were received by the defendants as and for the purposes therein also mentioned, were comprised and contained in the said dressing-case, and together therewith formed one parcel, and that the same were so received by the defendants *after the passing of a certain act of parliament made and passed at the session of parliament holden at Westminster, in the 11th [*845 year of the reign of King George the Fourth, and the 1st year of the reign of the late King William the Fourth, intituled “An act for the more effectual protection of mail-contractors, stage-coach proprietors, and other common carriers for hire, against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof;” and that, before and at the time when the defendants so as aforesaid received the said other goods and chattels of the plaintiff, they the defendants were common carriers of goods by land for hire, by certain public conveyances, to wit, the said carriages in the said first count mentioned, in and upon the said railway, and between the places therein in that behalf also mentioned; and that they so received the said goods and chattels of the plaintiff, as such carriers, for the purposes aforesaid; that the said goods and chattels of the plaintiff in the said first count mentioned, consisted of, and then were, articles and property of the descriptions following, *or some or one of such descriptions*, (a) that is to say, gold or silver in a manufactured state, precious stones, jewellery, a watch, trinkets, gold or silver plate, and that the value thereof then and always since exceeded the sum of 10*l.*; that, before the said time when the defendant so received the said other goods and chattels of the plaintiff for the purposes aforesaid, they the defendants had, in pursuance of and according to the said act of parliament, notified, by a notice affixed, in legible characters, in a public and conspicuous part of the said railway station called Woodgate Station, in the *said first count mentioned (the same station before that time and then being a receiving-house where parcels and packages then were and still are received by them, the defendants, for the purpose of conveyance, and also the receiving-house where the said other goods and chattels of the plaintiff were received by them for the purposes aforesaid), an increased rate of charge demanded by them for the carriage of articles and property of the description above specified, exceeding the value of 10*l.*, and in which said notice was then and there stated and set forth in such legible characters as aforesaid, the increased rate of charges required by them, the defendants, to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of, amongst other things, valuable articles of any of the descriptions above mentioned and specified; and that, at the time of the delivery to

(a) See *Smith v. The London, Brighton, and South Coast Railway Company*, ante, p. 782.

and receipt by them as aforesaid of the said dressing-case with the contents thereof (being the said other goods and chattels of the plaintiff in the said first count mentioned, and articles and property of some or one of the descriptions aforesaid, and of a value exceeding the sum of 10*l.*), neither the value nor nature of the said other goods and chattels of the plaintiff was then, or at any other time declared by him, or by the person sending or delivering the same to the defendants, to the person receiving the same on their behalf, nor was the said increased rate of charge, so notified by and stated and set forth in the said notice as aforesaid, or any increased rate of charge over and above the ordinary rate of carriage, or any engagement to pay the same respectively, then, or at any other time, offered to or accepted by the defendants, or by the person receiving the same goods and chattels for the purposes aforesaid, or by any other person or persons on behalf of the defendants—verification.

Fifthly,—to the second count,—that the defendants *were not *847] the owners or proprietors of the said railway, railway-station, offices, or buildings, engines, or carriages, or common carriers for hire, as in that count was alleged ; concluding to the country.

Sixthly,—to the second count,—that the defendants did not receive or accept of and from the plaintiff, nor did the plaintiff deliver to them, the said dressing-case and other goods and chattels in that count mentioned, or any of them, or any part thereof, to be carried, conveyed, or delivered, as in that count was alleged ; concluding to the country.

Seventhly,—to the second count,—the same as the fourth plea.

Eighthly,—to the third count,—that the plaintiff did not cause to be delivered to the defendants, nor did the defendants accept or receive of and from the plaintiff, the said dressing-case and other goods and chattels in that count mentioned, or any of them, or any part thereof, for the purposes therein above mentioned, or any or either of them ; concluding to the country.

Ninthly,—to the third count,—the same as the fourth plea.

The plaintiff joined issue on the first, second, third, fifth, sixth, and eighth pleas, and replied *de injuriâ* to the fourth, seventh, and ninth pleas respectively ; whereupon issue was joined.

The cause was tried before WILDE, C. J., at the sittings in London, after Hilary term, 1848. The facts were as follows : On the 10th of November, 1846, Mrs. Richards, the wife of the plaintiff, accompanied by a female servant, took places for London in a first-class carriage on The London, Brighton, and South-Coast Railway, at the Woodgate Station, near Bognor, in Sussex, bringing with them a considerable quantity of luggage, which was weighed, and the excess beyond the quantity *848] allowed to first-class passengers paid for. On their *arrival at the terminus at London Bridge, the lady, who was an invalid, was assisted to a hackney-coach, into and upon which the luggage was placed by certain porters of the company, who, upon the maid attempting to

remove the small articles from the railway carriage to the coach, desired her not to trouble herself, as *they* would see to the luggage. Upon reaching the residence of Colonel Richards, in Cambridge Terrace, Edgeware Road, it was for the first time discovered that part of the luggage, *viz.* a dressing-case, containing trinkets and jewellery, *which had been placed by the driver of the fly which contained Mrs. Richards and her servant from Bognor to the Woodgate Station, under the seat of the railway carriage,* was missing, and, notwithstanding the most searching inquiry, no trace of it could be discovered. On the part of the defendants, it was insisted that the dressing-case in question, and its contents, never came into their custody, and, consequently, that they were not responsible for the loss; and that, if the defendants ever did receive the articles, they were exempted from liability under the carriers' act, 11 G. 4 & 1 W. 4, c. 68,(a) the 1st section of which protects common carriers from liability for the loss of articles of the description mentioned in the declaration, unless specified and paid for accordingly.

His lordship left it to the jury to say whether the defendants had received the dressing-case into their custody for the purpose of conveying and delivering it, and whether they had performed that contract.

The jury returned a verdict for the plaintiff, damages 150*l.*

Talfourd, Serjt., pursuant to leave reserved to him, in Easter term last, obtained a rule nisi to enter a verdict *for the defendants, upon [*849 the grounds urged at the trial.

Byles, Serjt., and *Bovill*, now showed cause. The first question is, whether there was any evidence to go to the jury, that the defendants became responsible at all for the safe conveyance and delivery of the dressing-case. The main reliance of the defendants at the trial, was, that it appeared to have been placed in the railway carriage by the driver of the fly which brought Mrs. Richards from Bognor to the Woodgate Station, and not by any servant of the company. To render the defendants liable, it was not necessary that the article should have actually come into the possession of one of their servants, or even that it should have been seen by them. [CRESSWELL, J. Suppose, as was suggested when the rule was moved for, the passenger puts the thing in his pocket, and his pocket is picked?] The case is not *ad idem*: and it might be said that an article in the pocket of a passenger, has the peculiar protection of the person. An inn-keeper is responsible for the safe custody of goods of a guest, although he does not know the guest has them, and although the key of the chamber in which they were placed has been given up to the guest: *Calye's case*, 8 Co. Rep. 32 a. There are many cases where it has been held that a stage-coach proprietor is responsible for the loss of a passenger's luggage, though it were under the passenger's own eye. Thus, in *Robinson v. Dunmore*, 2 Bos. & Pull. 416, it was held, that, if A. sends goods by B., who says, "I will warrant that they

(a) *Vide ante*, p. 784 (a).

shall go safe," B. is liable for any damage sustained by the goods, notwithstanding A. sends one of his own servants in B.'s cart to look after them. CHAMBERE, J., there says: "This is a very clear case. The *850] defendant *is not a common carrier by trade, but has put himself into the situation of a common carrier by his particular warranty. As to possession, that seems clearly proved by the circumstances of the case: the defendant attends with his horse and cart at the plaintiff's house, where the goods are delivered to him, and put into the cart by the plaintiff's servants. This is a complete possession. How is this affected by the presence of the plaintiff's servant? It has been determined, that, if a man travel in a stage-coach, and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost. In this case, the plaintiff, for greater caution, sends his servant with the goods, who pays for watching them, because he apprehends danger of their being stolen. So, the man who travels in a stage has some care of his own property, since it is more for his interest that the property should not be lost, than that he should have an action against the carrier."

Then, are the three counts, or is either of them, proved? The first count states that the defendants are owners of the railway and carriages, and common carriers thereon for hire between Woodgate Station and the terminus at Southwark; that Mrs. Richards at their request became a passenger in and upon the railway, to be carried and conveyed therein from Woodgate Station to the terminus at Southwark, together with her luggage, consisting of (amongst other things) a dressing-case, also to be carried and conveyed by the defendants, as such carriers, in and upon the railway, from Woodgate Station to the terminus at Southwark, and there, to wit, at the terminus at Southwark, safely and securely to be delivered for the plaintiff, for reasonable reward to the defendants in that behalf: and the breach assigned, is, that the defendants did not use due and *851] proper care in and about the carriage and conveyance of the dressing-case from Woodgate Station to the terminus at Southwark, and so the same was lost; or, in other words, that the defendants failed to perform their contract safely to carry and deliver the dressing-case. The words "to" and "from" are sometimes exclusive, and sometimes inclusive: *Pim v. Curell*, 6 M. & W. 234; *The North and South Shields Ferry Company v. Barker*, 2 Exch. 136. The breach here means that the defendants did not carry and convey the luggage to the terminus, according to the duty before alleged. The transit was not ended on the arrival of the train at the terminus: it continued until the luggage was delivered to the owner or placed in the hackney-carriage. In *Bourne v. Gatcliffe*, goods were brought from Belfast under a bill of lading making them deliverable to the consignee at the port of London. On the arrival of the vessel, the goods were landed at Fenning's Wharf, where

they were on the same night destroyed by an accidental fire. In an action against the ship-owners for non-delivery of the goods, it was insisted, on the part of the defendants, at the trial, that a delivery of the goods upon Fenning's Wharf was in point of law a sufficient delivery. The learned judge, however, declined so to direct the jury, and the Exchequer Chamber, upon the argument of a bill of exceptions, upheld that ruling: (a) and the House of Lords confirmed their decision, 7 M. & G. 850, 8 Scott, N. R. 604. [CRESWELL, J. There, the breach was, non-delivery of the goods: it differs from the present case.] There is sometimes a great degree of nicety in ascertaining when the duty of the carrier is at an end. In Story on Bailments, §§ 538, 539, it is *said [*852 that, "as soon as the goods have arrived at their proper place of destination, and are deposited there, and no further duty remains to be done by the carrier, his responsibility, as such, ceases. If a carrier between A. and B. receives goods to be carried from A. to B., and thence to be forwarded by a distinct conveyance to C.; as soon as he arrives with the goods at B., and deposits them in his warehouse there, his responsibility as carrier ceases; for, that is the terminus of his duty as such. He then becomes, as to the goods, a mere warehouseman, undertaking for their further transportation." "And the like result would be, if the goods were destined to B. only, if it is not by the custom of the business the carrier's duty to deliver the goods to the consignees there, but simply to deposit them in the warehouse. But, if it is his duty to deliver the goods to the consignees at B., then his liability as carrier does not cease by such a deposit; but he is chargeable for any loss which occurs, until an actual delivery to the party." An allegation that the defendant contracted to carry a parcel, or a passenger, from London to Bath, or to Blackheath, is supported by evidence of a contract to carry from Westminster to Bath or Blackheath: Beckford v. Crutwell, 1 M. & Rob. 187; Ditcham v. Chivis, 4 Bing. 706, 1 M. & P. 735. [CRESWELL, J. When the company contract to deliver the passenger and her luggage, where do they contract to deliver them?] Each at the usual place for the delivery of each. In Walker v. Jackson, 10 M. & W. 161, a similar question to this arose in the case of a ferry, and it was held to be properly left as a question of usage. The declaration stated that the defendants were possessed of a ferry across the river Mersey, from Woodside to Liverpool, *and that the plaintiffs delivered to them [*853 certain goods, to wit, a phaeton, and certain jewellery and watches contained in it, to be by the defendants, for reward to them in that behalf, taken care of and carried in a certain steamboat, from Woodside to Liverpool, *and there landed* for the plaintiffs; that the defendants accepted and received the said carriage so containing the said jewellery and watches from the plaintiffs, and it became their duty to take proper care of them while they remained in their custody, and in and about the

(a) Bourne v. Gatcliffe, 3 M. & G. 643, 3 Scott, N. R. 1.

carriage, conveyance, and landing of the same as aforesaid: and alleged for breach, that the defendants took such bad care of the said carriage, jewellery, and watches, and so negligently conducted themselves in and about the carriage, conveyance, and landing of the same, that they were injured. The defendants pleaded that the plaintiffs did not deliver to them, nor did they accept and receive from the plaintiffs, the goods in the declaration mentioned, to be by them carried and conveyed in the said steamboat from Woodside to Liverpool and *there landed* for the plaintiffs, for reward to them in that behalf, *modo et formâ*. And it was held, that a contract to carry *and land* the carriage and jewellery, as stated in the declaration, could not be implied from the mere character of the defendants as owners of the ferry: but that it was a question for the jury whether there was in fact a contract between the parties, either express, or implied from usage, to receive the carriage on board, and to land it again at the end of the transit across the river. The evidence was, that one of the plaintiffs went on board the defendant's steamboat, with his horse and carriage, paying the defendants' charge for a "light four-wheeled phaeton;" that jewellery and watches of great value, which much increased its weight, were contained in a box under the seat; and that he made no communication of that fact to the *854] defendants. The carriage was taken safely across the river, and, on the arrival of the boat at the pier-head at Liverpool, two of the defendants' servants put the carriage out upon the slip, and commenced drawing it up the slip towards the quay, but, in doing so, were overpowered by its weight, and it ran down into the river, whereby the jewellery and watches were injured. And it was held, that the plaintiff's right of action for this injury was not affected by their not having communicated the fact of the jewellery and watches being contained in the carriage; and that it was a further question for the jury (supposing a contract to land were established), whether the landing was complete under the above circumstances.

The second count alleges the defendants to be common carriers for hire "from all parts of their said railway to that or those part or parts of their said station, offices, and buildings, where hackney-cabs and carriages are used and accustomed, by license and permission of the defendants, to come and ply for hire;" and it then proceeds to allege that the dressing-case in question was delivered to the defendants "to be safely and securely carried and conveyed by them the defendants, as such carriers, from a certain carriage of the defendants, then being in and upon their said railway, and at the terminus of the railway, and within the said station, offices, and buildings, to a certain other part of the said station, offices, and buildings, being the part of the said station where hackney-cabs and carriages were so used and accustomed as aforesaid to come and ply as aforesaid, and to a certain hackney-carriage then and there plying and being within the said station, offices, and buildings, by the leave,

license, and permission of the defendants, and then and there engaged and hired for and by the plaintiff, and then and there, to wit, at the said other last-mentioned part *of the said station, and at the said [*855 hackney-carriage, there being, to be safely and securely delivered for the plaintiff:" and the count then alleges for breach the loss of the dressing-case through the defendants' negligence. It appeared in evidence that the company employ porters for the removal of passengers' luggage from the railway carriages to the carriages hired for their conveyance from the station. The company are clearly responsible for the negligence of their servants in the performance of this duty, according to the principle laid down in *Hyde v. The Trent and Mersey Navigation*, 5 T. R. 389, *Muschamp v. The Lancaster and Preston Junction Railway Company*, 8 M. & W. 421, *Pickford v. The Grand Junction Railway Company*, 12 M. & W. 766, and *Machin v. The London and South-Western Railway Company*, 2 Exch. 415, 17 Law Journ. N. S., Exch. 271.

The third count charges the defendants with that degree of responsibility which the law imposes upon gratuitous bailees. The evidence here was amply sufficient to justify the jury in finding the defendants guilty of such gross negligence as to charge them in that character.

Talfourd, Serjt., and *Bramwell*, in support of the rule. The dressing-case in question never was in the custody of the defendants as carriers at all. It was placed by the driver of the fly, at Woodgate Station, into the railway carriage, and there left under the special and immediate care of Mrs. Richards herself, or of her servant. The company, consequently, never incurred any responsibility whatever in respect of it.

If the dressing-case was delivered to the defendants, it was delivered to them for the purpose of being conveyed to London, as alleged in the first count: and that *duty they had completely discharged at the [*856 moment the carriage arrived at the terminus in Southwark. They had then no further duty to perform towards the plaintiff's wife or her luggage. The cases referred to on the other side are altogether inapplicable to a state of facts like the present.

There was no evidence of any custom, or of any duty such as that alleged in the second count, viz. to carry the luggage of the passenger from the railway to the hackney-carriage. That which is done by the servants of the company in that respect, is mere courtesy or over officiousness on their part. Suppose the porters, in carrying the lady herself to the hackney-carriage, from inebriety or carelessness, had let her fall, and injured her, would the company have been responsible for that? A question somewhat analogous to this arose in *Cox v. The Midland Counties Railway Company*, 18 Law Journ. N. S., Exch. 65, where it was held that it is not incident to the employment of a guard or superintendent of a railway station, to enter into a contract with a surgeon to attend a passenger injured by an accident on such railway, and therefore that the railway company are not liable to the surgeon for services rendered to such pas-

senger under a contract so entered into. There must be some limit to the liability of the company for acts done by their servants beyond the ordinary scope of their authority.

As to the third count,—there was nothing to warrant the jury in finding the defendants guilty of *gross* negligence; as there might have been, if it could have been shown that they knowingly employed persons to assist in removing luggage, whom they knew to be dishonest. [CRESSWELL, J. In *Bourne v. Gatcliffe*, it was left to the jury to say whether a *857] delivery of the goods *at Fenning's Wharf was a delivery according to the contract. Was any such question left here?] It was not. [Byles, Serjt. If any such question ought to have been left, it was the duty of the defendants to ask the judge so to leave it.]

WILDE, C. J. It appears to me that the plaintiff in this case has proved enough to entitle him to a verdict upon the first count, and therefore it is unnecessary to enter into any very minute consideration of the other two counts.

The first count alleges, that, on a certain day, one Charlotte Susanna Richards, the wife of the plaintiff, at the request of the defendants, became and was a passenger in, upon, and along the railway of the defendants, and the defendants then received into one of their said carriages in and upon their said railway the said Charlotte Susanna as a passenger in, upon, and along the said railway, *to be carried and conveyed* therein and thereby from Woodgate Station to the station or terminus at London Bridge, together with the luggage, consisting of a certain dressing-case and certain other goods and chattels, of the plaintiff, to wit, &c., of great value, &c., also to be carried and conveyed by the defendants, as such carriers as aforesaid, in, upon, and along the said railway, from Woodgate Station aforesaid to the said station or terminus at Southwark aforesaid, and there, to wit, at the said station or terminus at Southwark aforesaid, *safely and securely to be delivered* for the plaintiff, for reasonable reward to the defendants in that behalf. That is the allegation of the defendants' duty: and the breach assigned, is, that the defendants, not regarding their duty in that behalf, did not use due and proper care in and about *the carriage and conveyance* of the said dressing-case, goods, and chattels of the plaintiff, from Woodgate Station *858] aforesaid to the said *station or terminus at Southwark aforesaid, but took so little and such bad care in and about *the carrying and conveying* of the said dressing-case, goods, and chattels, that, by and through the carelessness, negligence, and improper conduct of the defendants in the premises, the said dressing-case, goods, and chattels became and were lost to the plaintiff. The duty of common carriers, by the common law, is perfectly well understood: it is a warranty safely and securely to carry; whether they be guilty of negligence or not, is immaterial; the warranty is broken by the non-conveyance or non-delivery of the goods intrusted to them. The insertion in the count of

superfluous matter will not affect the plaintiff's right to recover, provided a good cause of action is alleged and proved. It is not unusual, in actions for breach of warranty, to charge fraud. But that is altogether immaterial and unnecessary: it is enough to prove the warranty, and the breach or non-performance of it. The result upon the first count here, is, that the plaintiff's wife was received by the company as a passenger, to be carried with her luggage from Woodgate Station and safely and securely delivered at the terminus in London; and that, by the improper conduct of the servants of the company, a part of the luggage was never delivered. Does that disclose a good cause of action? I am of opinion that it does, and that the defendants have shown nothing which in point of law releases them from the general obligation which the law casts upon them. On the part of the defendants, it is contended that the goods *were* carried. But the allegation is, that they were received by the company to be carried and conveyed *and delivered* at the terminus in London; and they were not *delivered*. I think it was clearly established that the dressing-case was delivered to the company. The facts are simple. The lady comes to the station in a fly. The *dressing-case is put into the carriage to be conveyed to London [*859 with her. Nothing is more common. No doubt this might have been done under such circumstances as would discharge the carriers, or, more properly speaking, under such circumstances as never to cast upon them the responsibility of carriers. But that would depend upon the evidence. Suppose a passenger to get into a carriage with a pocket-book in his pocket, and, on arriving at the terminus, to take it out of his pocket, and ask a porter to carry it to a cab; it may be, that, under such circumstances the company would not be responsible if the pocket-book were lost in the transit. Taking the case as denuded of any facts which could warrant any question of fraud being left to the jury, and there being no other circumstances to exonerate the company from the liability which ordinarily attaches to common carriers, it seems to me that the evidence sustains the first count; and that that count discloses a perfectly good cause of action, though accompanied by superfluous and unnecessary matter. The fact of the dressing-case having been placed under the seat of the carriage, and so under the more immediate control and inspection of the passenger, in my opinion makes no difference.

CRESSWELL, J.(a) I am of the same opinion. There was abundant evidence to show that the dressing-case in question came into the custody of the defendants under such circumstances as to make them responsible for its safe conveyance and delivery. They could not be said to have fulfilled their contract without delivery: and, if it was the usual course to deliver the luggage of passengers at a particular part of the platform, that was *the sort of delivery the defendants took upon [*860

(a) COLTMAN, J., not having heard the whole of the argument, took no part in the decision.

themselves to make. In *Bourne v. Gatcliffe*, a question arose as to the mode of delivery of goods brought into the port of London by steam-vessels: but that is quite beside the present case. The defendants here were bound to deliver Mrs. Richards's luggage. Did they do so? It seems to me that they did not. Their contract, therefore, was not performed. A carrier who undertakes for hire to carry goods, is bound to deliver them at all events, except damaged or destroyed by the act of God or the King's enemies,—even though the jury expressly find that they were destroyed without any actual negligence in the defendant: for, a carrier is in the nature of an insurer. This was laid down in *Forward v. Pittard*, 1 T. R. 27, and *Garside v. The Trent Navigation*, 4 T. T. 581; and it has never been disputed since. Here, there is in the first count an allegation, that, by and through the carelessness, negligence, and improper conduct of the defendants, the dressing-case and its contents became and were wholly lost to the plaintiff. That is, in substance, an allegation that the loss was occasioned by the default of the defendants, in not having performed what they were bound to do.

V. WILLIAMS, J. I am of the same opinion. Upon the facts proved, I think the defendants were clearly liable for the loss of the dressing-case in question. It was in their custody, as common carriers, at the time of the loss. I must confess I think the transit was at an end before the loss. I express no opinion as to whether or not the defendants could be compelled to do more than deliver the luggage *on the platform*. But, if the company choose to provide a more convenient mode *861] of delivering luggage to passengers, by employing porters to carry it across the platform, to the vehicles by which it is to be taken away, I think their liability as carriers continues until the porters have discharged their duty. I feel some difficulty in applying the facts to the pleadings. I do not think either the second or the third count made out. But I am not disposed to quarrel with the somewhat liberal view the rest of the court take as to the first count, or with the copious rejection of immaterial matter which they think themselves authorized to make. Upon the whole, I agree that the defendants failed to deliver the articles in question, within the terms of the first count.

Rule—Verdict for the plaintiff on the issues taken on the first count; for the defendants on all the other issues, except those upon the carriers' act.

HAMBER v. JAMES ROBERTS. May 8.

In an action by a messenger of the court of bankruptcy, against J. S., for fees due from him as petitioning-creditor under a *fiat*.—Held, that the plaintiff proved a *prima facie* case, by putting in the proceedings under the *fiat*, without showing the identity of the defendant with the J. S.—named therein as the petitioning-creditor.

It is no ground for a new trial of an action before the secondary or under-sheriff, that the particulars of demand are not annexed to the writ of trial.

THIS was an action by a messenger of the court of bankruptcy, against a petitioning-creditor, for his fees. At the trial before the secondary of London, on the 2d of May instant, it appeared from the proceedings under the *fiat*, which were put in, that the name of the petitioning-creditor was "James Roberts:" but it was objected on the part of the defendant, that there were no particulars of demand annexed to the writ of trial; and, further, that, in the absence of some evidence *to identify [*862 him with the person so named, there was nothing to go to the jury.

The secondary, however, thought otherwise; and the jury returned a verdict for the plaintiff for the amount claimed.

Prentice now moved for a new trial, on the ground of misdirection. There being no evidence to identify the defendant with the James Roberts whose name appeared on the proceedings as petitioning-creditor, there was nothing to go to the jury. [V. WILLIAMS, J., referred to *Sewell v. Evans*, and *Roden v. Ryde*, 4 Q. B. 626, where it was held, that, to prove the execution by the defendant of an instrument on which he is sued, if it be shown that such instrument is executed by a person bearing the defendant's name, it is not necessary to give evidence strictly identifying the person whose signature is proved, with the party on whom process has been served, unless facts appear which raise a doubt of the identity. Thus, in an action for goods sold against W. S. Evans, it appeared, that, about five years before action brought, W. S. Evans had been a customer, and had written a letter, acknowledging the receipt of the goods: the witness who proved these facts did not know whether the defendant was the same W. S. Evans; nor was any further evidence given of the fact: and it was held a sufficient *prima facie* case. So, in an action against H. T. Ryde, as acceptor of a bill of exchange, it appeared that H. T. Ryde had kept cash at the bank where the bill was made payable, and had drawn checks, which the cashier had paid: the cashier knew the party's handwriting, by the checks, and swore that the acceptance was in the same handwriting; but he had not paid any checks for some time, did not *know the party personally, and could not [*863 further identify him with the defendant: and it was held a sufficient *prima facie* case.] Here, there was no proof that the signature of the petitioning creditor was in the handwriting of the defendant. In *Roscoe on Evidence*, 6th edit. 208, it is laid down on the authority of *Whitelocke v. Musgrove*, 1 C. & M. 511, and *Jones v. Jones*, 9 M. & W. 75, that, in an action against the acceptor of a bill of exchange, "some evidence of the identity of the defendant and the person who accepted the bill, is necessary, and it is not sufficient merely to prove that a person calling himself by the same name, accepted it." In *Jones v. Jones*, which was an action by an endorsee against the maker of a promissory note, the defendant pleaded,—first, that he did not make the note, secondly, that he made it for the accommodation of the plaintiff: there was an attesting-witness to the note, who, on being called at the trial,

stated that he saw the signature (Hugh Jones) to the note written by a party whose occupation and residence he described, but that he had had no communication with him since, and that this was a common name in the neighbourhood where the note was made : and it was held that there was no evidence to go to the jury of the identity of the defendant with the maker of the note ; and that the second plea could not be called in aid for that purpose. [CRESSWELL, J. *Greenshields v. Crawford*, 9 M. & W. 314, 1 Dowl. N. S. 439, is rather at variance with *Jones v. Jones*. There, in an action by an endorsee against the acceptor of a bill of exchange, it appeared that the bill was directed to "Charles Banner Crawford, East India House," and accepted "C. B. Crawford:" it was *864] proved that this signature was the handwriting of a gentleman *of that name, formerly a clerk in the East India house, who had left it five years before : and it was held that this was sufficient evidence of the identity of the defendant with the person whose handwriting was proved.] There, the bill was directed to a person at a particular place. [CRESSWELL, J. There was no proof that the defendant had ever been a clerk in the East India House.]

The particulars of demand were not annexed to the writ of trial, as the rule of court(a) requires. [WILDE, C. J. The proper remedy for that, was, to take out a summons to compel their annexation.] The defendant had no means of knowing that they were not there, until he appeared at the trial ; inasmuch as the writ of trial only goes down on the day of trial. This is a clear irregularity ; and there must be some mode of taking advantage of it.

WILDE, C. J. I think the evidence given on this occasion proved a *prima facie* case : and I think it would be productive of much mischief to give rise to a doubt by granting a rule. The omission to annex the particulars of demand to the record, clearly is no ground of motion for a new trial.

The rest of the court concurring,

Rule refused.

(a) Trinity term, 1 W. 4, r. 6.

*865] *SHACKEL v. JOHNSON. May 8.

A defendant arrested on a *capias* under the 1 & 2 Vict. c. 110, deposited with the sheriff the amount endorsed, with 10*l.* for costs, pursuant to the 43 G. 3, c. 46, and shortly afterwards embarked with his family for Australia, without putting in bail above, or leaving any attorney or agent to act for him. The court granted the plaintiff a rule nisi for taking the money out of court, subject to any deduction from the 10*l.*, upon taxation,—which rule was made absolute, upon service by sticking up such rule nisi in the office.

THE defendant having been arrested upon a *capias* issued under the 1 & 2 Vict. c. 110, endorsed for bail for 60*l.*, in lieu of giving bail to the sheriff, deposited with the officer the sum of 60*l.*, together with 10*l.*

to answer costs, pursuant to the statute 43 G. 3, c. 46, which sums respectively had been paid into court. The time for putting in bail above having expired, and no bail having been put in,

Byles, Serjt., on a former day in this term, obtained a rule calling upon the defendant, "upon notice of the rule being given to him or his attorney, to show cause why the several sums of 60*l.* for debt and 10*l.* for costs, paid by the defendant on his arrest in this action, into the hands of the sheriff of Kent, and by the said sheriff paid into the hands of the masters of this court, pursuant to the statute 43 G. 3, c. 46, should not be paid out of court to the plaintiff or to his attorney, the said defendant not having duly put in and perfected bail in this action,—such payment to be made subject to any deductions, if any, from the said sum of 10*l.* deposited and paid to answer the costs as aforesaid, as upon taxation of the plaintiff's costs, as well of the action as of this application, might be found reasonable." The affidavit upon which the motion was founded,—that of the plaintiff's attorney,—stated, that the only residence or dwelling-place of the defendant known to the deponent, was situate at Ealing, in the county of Middlesex, where the defendant lately carried on the business or profession of a surgeon, down to about the 23d of *April last; that the deponent had been informed by [*866 Mr. J. T. of Ealing aforesaid, a neighbour of the defendant,—and verily believed such information to be true,—that the defendant had departed from his said residence at Ealing, and left this country, with his family, for Port Philip, in Australia; that the deponent had also been informed by Mr. J. A. of Gravesend, in the county of Kent, officer to the sheriff of Kent,—and verily believed such information to be true,—that the defendant left Gravesend, on board the ship *Medway*, bound for Port Philip aforesaid, on the 27th of April last; and that the deponent did not know, nor did he believe, that the defendant had consulted or employed on his behalf any attorney in this action.

Byles, Serjt., now moved to make the rule absolute,—no one appearing to show cause,—upon an affidavit by the plaintiff's attorney, stating, that, on the 4th instant, he called at the late dwelling-house of the defendant, situate at Ealing, where the defendant had carried on his business of a surgeon, and there saw a Mr. G., who informed the deponent,—and which information the deponent believed to be true,—that he (Mr. G.) had bought the defendant's practice, that he (Mr. G.) believed the defendant was gone with his wife and family to settle at Port Philip, that the defendant had not any attorney that he had ever heard of, and that, in all the transactions between himself and the defendant, the latter had acted entirely for himself; that Mr. G. informed him, the deponent, that he did not know anybody who was authorized to act for the defendant, and referred him to No. 16, Prince's Street, Cavendish Square, as a place where he might obtain some information respecting the defendant; that the deponent accordingly proceeded to No. 16, Prince's Street, Cavendish

*867] *Square, where he saw a lady, who informed him that the defendant had gone abroad to settle with his family, but said she knew of no attorney in England who was authorized to act for him, or take in any papers for him; that the deponent, on the same day, called at the office of the owner of the ship Medway, and was informed by a clerk there, that the defendant was on board that vessel with his wife and family, that the vessel had left Gravesend about a week, and that he knew of no attorney or other person who acted for the defendant or took in any papers for him; that the deponent, on the same day, called at the office of the agents of the Medway, where he obtained similar information; that the deponent did not know, nor did he believe, that the defendant had consulted or employed on his behalf any attorney in this action; that he had made diligent inquiries to find out some attorney or other person on whom he could serve the rule nisi, but without effect; and that he had, on the said 4th of May instant, stuck up a copy of the rule in the office of this court.

WILDE, C. J. It seems to me that the plaintiff has done all that he could reasonably be expected to do, to serve the rule, and therefore that he is entitled to have it made absolute.

The rest of the court concurring,

Rule absolute.

*868]

*JOHNSON v. WARD. May 8.

The affidavit to found a motion for a suggestion to deprive a plaintiff of costs under the county-courts act, 9 & 10 Vict. c. 95, s. 129, must allege *with certainty and precision* that the plaintiff did not, at the time of the commencement of the action, dwell more than twenty miles from the defendant.

THIS was an action of debt, tried before the under-sheriff of Middlesex, on the 12th of April last, when the plaintiff obtained a verdict for 12*l*.

Ball, on a former day in this term, obtained a rule nisi to enter a suggestion under the county-courts act, 9 & 10 Vict. c. 95, s. 129, to deprive the plaintiff of costs, on the ground that the action was brought to recover a debt for which a plaint might have been levied in the Mary-le-bone county-court of Middlesex.

The affidavit on which the motion was founded, stated "that, before and at the time this action was brought, he, this deponent, dwelt at 33, John Street, Portland Town, in the county of Middlesex, within the district of Mary-le-bone, in the county of Middlesex, and within the jurisdiction of the Mary-le-bone county-court, holden under the provisions of the said act; and that the said cause of action arose wholly, or in some material point, within the jurisdiction of the said county-court of Mary-le-bone aforesaid; and that, at the time of the commencement of this action, the plaintiff did not dwell more than twenty miles from the

defendant, but dwelt within twenty miles from this deponent (the defendant), *that is to say*, that the *defendant* dwelt at 33, John Street, Portland Town, in the county of Middlesex, and within twenty miles of the Mary-le-bone county-court as aforesaid:" and it then proceeded to negative the other exceptions in the act.

Joyce, who showed cause, insisted that the affidavit was insufficient, inasmuch as it did not, in distinct and *positive terms, allege that the plaintiff dwelt within twenty miles from the defendant, so as [869 to sustain an indictment for perjury if the fact were otherwise.

Ball, in support of his rule, submitted that there was a clear and positive statement in the affidavit, that, at the time of the commencement of the action, "the plaintiff did not dwell more than twenty miles from the defendant," the rest being mere surplusage; and that, if the fact were that the plaintiff *did* reside more than twenty miles from the defendant, the deponent would not escape an indictment for perjury.

WILDE, C. J. I think, if you were his counsel, you would hardly consider you did him justice if you omitted to take the objection. It appears to me that the affidavit is clearly insufficient.

The rest of the court concurring,

Rule discharged.(a)

(a) And see *Dodd v. Wigley*, *ante*, p. 106; *Shiels v. Rait*, *ante*, p. 116.

Under the 13 & 14 Vict. c. 61,—the act for extending and amending the 9 & 10 Vict. c. 95,—it is no longer necessary for a defendant to move for a suggestion to deprive the plaintiff of costs.

The 11th section of that act enacts, "that, if, in any action commenced, after the passing of this act, in any of Her Majesty's superior courts of record, in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l.*, or if, in any action commenced, after the passing of this act, in any of Her Majesty's superior courts of record, in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum not exceeding 5*l.*, the plaintiff shall have judgment to recover such sum only, and no costs, except in the cases hereinafter provided, and except in the case of a judgment by default; and it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs; nor shall any such *plaintiff be entitled to costs by reason of any [870 privilege as attorney or officer of such court or otherwise."

The 12th section provides and enacts, "that, if the plaintiff shall, in any such action as aforesaid, recover a sum less than the sum in that behalf hereinbefore mentioned, by verdict, and the judge or other presiding officer before whom such verdict shall be obtained, shall certify on the back of the record that it appeared to him at the trial that the cause of action was one for which a plaint could not have been entered in any such county-court as aforesaid, or that it appeared to him at the trial that there was a sufficient reason for bringing the said action in the court in which the said action was brought, the plaintiff in such case shall have the same judgment to recover his costs, that he would have had if this act had not been passed."

And the 13th section provides and enacts, "that, if, in any such action, whether there be a verdict in such action or not, the plaintiff shall make it appear to the satisfaction of the court in which such action was brought, or to the satisfaction of a judge at chambers, upon summons, that the said action was brought for a cause in which concurrent jurisdiction is given to the superior courts by the 128th section of the recited act [9 & 10 Vict. c. 95.] or for which no plaint could have been entered in any such county-court, or that the said cause was removed from a county-court by certiorari, then, and in any of such cases, the court in which the said action is brought, or the said judge at chambers, may thereupon, by rule or order, direct that the plaintiff shall recover his costs, and thereupon the plaintiff shall have the same judgment to recover his costs that he would have had if this act had not been passed."

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Trinity Term,

IN THE TWELFTH YEAR OF THE REIGN OF VICTORIA.

THE judges who usually sat *in banco* in this term, were—

WILDE, C. J.

CRESSWELL, J.

COLTMAN, J.

V. WILLIAMS, J.

COLEMAN and DAVIS *v.* BIEDMAN. May 22.

The payee of a promissory note, having paid the amount to the endorsees, on default of the maker, sued the latter in the names of the endorsees, but without any authority from them, and obtained a verdict. The defendant having paid the debt, the court, upon his application, stayed the proceedings, *without costs on either side*, and each party bearing his own costs of the rule.

THIS was an action upon a promissory note for 50*l.*, made by Biedman, on the 31st of October, 1848, payable two months after date to one Marshall, or his order, and endorsed by Marshall to the plaintiffs.

The note having become due on the 3d of January, 1849, and not being paid by Biedman, Marshall on the 4th paid 45*l.*, on account, to the plaintiffs; and on the 8th Biedman paid to the plaintiffs 35*l.*; where-
*872] upon *the plaintiffs handed over the note to Marshall, together with 30*l.*

On the 24th of January, Marshall caused a writ to be issued against Biedman, in the names of the plaintiffs, to recover the balance due upon the note. The defendant pleaded to the action,—first, that he did not make the note,—secondly, payment. The cause was tried at the last assizes at Hertford, when a verdict was found for the plaintiffs for 15*l.* 2*s.* 6*d.* debt, damages 1*s.*, costs 40*s.*, and a certificate was given for speedy execution *for the debt*, which was accordingly paid.

Bovill, in the last term, on behalf of the defendant, obtained a rule calling upon Marshall, and his attorney, Lewis, to show cause why all

further proceedings in the action should not be stayed, and why Marshall and his attorney, or one of them, should not pay to the defendant his costs of the action and of this application, as between attorney and client. The motion was founded upon affidavits, showing that the action had been brought by Marshall in the names of Coleman and Davis, without their authority or sanction.

Byles, Serjt., for Marshall, produced an affidavit showing that Marshall had some ground for believing that he had the authority of Davis for bringing the action in the names of Coleman and Davis. He submitted that Marshall not being a party to the record, or an attorney of this court, the court had no jurisdiction to fix him with costs. [WILDE, C. J. If a party assumes to sue out the process of the court in the name of a third person, it does not lie in his mouth to say he is not a suitor, or that the court has no authority to visit him with costs.] The parties whose names were used do not complain; nor is it suggested that the defendant was at all prejudiced, in respect of any defence he might have had, or otherwise, by the action *being brought in the names of Coleman and Davis instead of being brought in that of Marshall. [*873

Lush, on behalf of Lewis, submitted that he had been guilty of no such impropriety as ought to subject him to costs; for, that it was by no means unusual for the holder to sue as trustee for an endorser who has been called upon to pay on the default of the drawee.

Bovill, in support of his rule, relied upon the affidavits on which he moved, as showing that the use made of the plaintiffs' names was unauthorized.

WILDE, C. J. In this case, some of the facts are quite clear and free from doubt or dispute. The plaintiffs gave no authority to Marshall to bring the action in their names. But it is not quite so clear that Marshall was aware that they had not given him such authority. It is not pretended that Marshall had any communication with the plaintiffs upon the subject, except at the time when he paid them the 45*l*. The fair result of the affidavits on the one side and on the other, seems to me to be, that the action was commenced and prosecuted in the names of the plaintiffs without any authority. Marshall certainly has acted carelessly in the matter. And his attorney has not used that degree of caution and circumspection which the court has a right to expect from its officers. The case is presented to us under somewhat peculiar circumstances. No injustice seems to have been done to the defendant; he has lost no defence by the action having been brought in the names of Coleman and Davis, instead of in that of Marshall. At the same time, the process of the court has been used in a manner not warranted by law. When actions are brought in the names of third persons not interested in the subject-matter, difficulties frequently arise in showing that the *use [874 of their names was duly authorized. In such cases, it behoves the attorney to place himself in a situation to show that he has not acted with-

out authority. Where it is distinctly made out that an improper use has been made of the process of the court, the parties so acting must be made to suffer to some extent. Under the circumstances, I think the plaintiffs' costs ought not to be allowed. At the same time, I am not disposed to give costs to the defendant, it not appearing that he has sustained any loss or inconvenience from the course pursued. It seems to me, therefore, that the justice of the case will be met, by making the rule absolute to stay the proceedings, without costs on either side, each party paying his own costs of this rule.

COLTMAN, J., concurred.

CRESSWELL, J. I must confess I feel at some loss to understand the precise ground upon which we are deciding. It may be that it is not reasonable to allow Marshall to continue to use the names of the plaintiffs. It certainly has been usual for applications of this sort to originate with the parties whose names have been improperly used. I am not, however, disposed to differ with the rest of the court; though I cannot help thinking the defendant has been rather fortunate in having an action brought against him in the names of Coleman and Davis, instead of in that of Marshall.

V. WILLIAMS, J., concurred.

Rule absolute accordingly.(a)

(a) Vide *Doe d. Vine v. Figgins*, 3 Taunt. 440; *Doe d. Hammek v. Fillis*, 2 Chitt. Rep. 170; *Thames Haven Dock and Railway Company v. Hall*, 5 M. & G. 274, 6 Scott, N. R. 342.

*875] *TATE v. HITCHINS and Others. May 22.

Assumpsit against several defendants for work and labour by the plaintiff as an attorney, with counts for money paid, &c. Plea,—by one of the defendants,—to the whole declaration, that the action was commenced, after the 6 & 7 Vict. c. 73, for the recovery of fees, charges, and disbursements due to the plaintiff as an attorney, as in the first count mentioned, and that no signed bill had been delivered to the defendant, or sent by the post to, or left for him at, his counting-house, office of business, dwelling-house, or last known place of abode:—Held, on special demurrer, that the word “disbursements” applied to the count for money paid; and that the plea sufficiently negatived the delivery of a bill of costs within the terms of the statute.

ASSUMPSIT on an attorney's bill. The first count of the declaration stated that the defendants were indebted to the plaintiff in the sum of 50*l.*, for the work and labour, care, diligence, and attendance of the plaintiff as the attorney of the defendants and otherwise, and upon their retainer prosecuting and defending suits, &c., and for fees due and of right payable in respect thereof, and also for divers journeys and attendances, &c., made and given in and about the business of the defendants, and for them and at their request. There was also a count claiming 50*l.* for money paid, laid out, and expended by the plaintiff for the defendants; and a count for 50*l.* alleged to be due from the defendants to the plaintiff upon an account stated.

The defendants severed in pleading. The defendant Hitchins pleaded,—first, non assumpsit to the whole declaration,—secondly, as follows:—And for a further plea in this behalf, the defendant says that the said action was and is commenced after the passing of an act of parliament made and passed in a session of parliament holden in the sixth and seventh years of the reign of Victoria [6 & 7 Vict. c. 73], intituled “An act for consolidating and amending several of the laws relating to attorneys and solicitors practising in England and Wales,” and that the same is now maintained by the plaintiff against the said defendant for the recovery of certain *fees, charges, and disbursements claimed by the plaintiff to be due to him from the said defendant, and in [*876 respect of certain business theretofore done by the plaintiff as an attorney and solicitor for the said defendant, as in the first count in that behalf mentioned: And the defendant further says that the plaintiff did not, one calendar month before the commencement of this suit, deliver unto the said defendant, he being the party to be charged therewith, or send by the post to, or leave for him at, *his* counting-house, office of business, dwelling-house, or last-known place of abode, or at either of such places, any bill of such charges, fees, and disbursements, subscribed with the proper hand of the plaintiff, either with his own name, or with the name or style of any partnership of which the plaintiff is or was at any time a member, or enclosed in, or accompanied by, any letter subscribed in like manner, referring to any such bill as aforesaid, as by the statute in such case made and provided is required: And the defendant further says that the account in the said last count mentioned was stated by the defendant of and concerning, and included in, the sum in the first count mentioned, and that the said two sums are one and the same debt,—verification.

Special demurrer to the second plea, assigning for causes,—that the said plea is pleaded to the whole declaration, and shows no answer whatever to the second count thereof,—that, if the same was intended to apply to the first and last counts only, it ought so to have been alleged in the commencement of the said plea,—that the said plea merely states that the plaintiff did not deliver to the defendant Hitchins, or send by the post to, or leave for him at, *his* counting-house, office of business, dwelling-house, or last-known place of abode, any bill of charges, subscribed by the plaintiff, as directed by the act of parliament, and it is consistent *with that allegation, that a bill of charges, subscribed by the plaintiff as the act directs, was delivered to one of the [*877 other defendants, and that the defendant Hitchins and the other defendants, jointly retained the plaintiff,—that the said plea ought to have alleged that no bill of charges had been delivered to either of the defendants, or it should have expressly alleged that no joint retainer was given, by the defendants to the plaintiff,—and that the said plea is no answer

to the last count of the declaration, or, at all events, that it is an argumentative denial of the statement of an account.

The defendant Hitchins joined in demurrer.

Barnard, in support of the demurrer. The plea, referring to the first count of the declaration, states that the action is brought for the recovery of fees, charges, and disbursements claimed by the plaintiff to be due to him in respect of business as an attorney and solicitor; and then it goes on to allege that the account in the last count mentioned was stated by the defendant of and concerning the sum in the first count mentioned. The pleader has entirely overlooked the count for money paid: whereas, each count being apparently for a different cause of action, each should be answered: *Rayner v. Wright*, 2 Dowl. N. S. 418. [CRESWELL, J. The first count says nothing about disbursements: the plaintiff could not recover them under that count. The money the plaintiff claims to have disbursed for the defendants, is, money disbursed by him as attorney, as mentioned in the first count. If he had said that the action was brought for that, and for nothing else, you would hardly have objected to that.] It does not follow that the plaintiff does not, in his second count, go for money paid other than in the way of professional disbursements.

*878] *The plea alleges the non-delivery of a signed bill pursuant to the 6 & 7 Vict. c. 73, s. 37,(a) to the defendant Hitchins. It is perfectly consistent with the plea, that a signed bill may have been duly delivered to one of the other defendants. [WILDE, C. J. There is a plea of non assumpsit by Hitchins. Then he says, you have delivered me no bill according to the statute. He has no means of knowing whether or not the plaintiff has delivered a signed bill to one of the eight or ten other persons with whom he is improperly joined.] The plea admits that the work was done for all the defendants jointly. [CRESWELL, J. For the purpose of the particular plea only.(b)] The words of the 37th section of the 6 & 7 Vict. c. 73, are, so far as regards this question, similar to those of the 2 G. 2, c. 23, s. 23. Under the last-mentioned act, such a plea as this would clearly have been bad on special demurrer: *Kiteley v. Scofield*, 6 Jurist, 1059. A delivery to one of several joint-contractors is sufficient: *Crowder v. Shee*, 1 Campb. 437. [CRESWELL, J. In *Kiteley v. Scofield*, the plea merely negatived a delivery to the defendant personally.] That is all that is alleged here.

Phipson, contra. [CRESWELL, J. What is there to prevent a man from stating an account with an attorney, without any delivery of a bill?] It has been held to be a good plea to a count on an account stated, that the account was stated solely of and concerning charges for work done as an attorney, and that no bill was delivered: *Eicke v. Nokes*, 1 M. & Rob. 359; *Brooks v. Bockett*, 9 Q. B. 847; *Scadding v. Eyles*, 9 Q. B. 858. [WILLIAMS, J., referred to *Jeffreys v. Evans*, 14 M. & W. 210,

(a) *Ante*, 746 (a).

(b) *Vide post*, 880 (d).

where it was held that it is no *answer to an action on a promissory note, that it was given on account of an attorney's bill not delivered pursuant to the 6 & 7 Vict. c. 73.] [*879

It is said that the second count is unanswered, for that the word "disbursements" in the plea refers only to disbursements as an attorney. "Disbursements" means the same as "money paid," and can only apply to the second count. And there is no demurrer on the ground of ambiguity. The demurrer assumes that the plea is not pleaded to the second count at all. *Rayner v. Wright* has no application: there, the identity of the sums claimed in the several counts, was not sufficiently shown; here it is—*Mee v. Tomlinson*, 4 Ad. & E. 262, 5 N. & M. 624.

It is further insisted that the plea is insufficient, inasmuch as it merely negatives the delivery of a bill to the defendant, *Hitchins*, *personally*, or a delivery at *his* dwelling-place or place of business. In *Vincent v. Slaymaker*, 12 East, 372, a party in a cause having changed his attorney in the progress of it, a judge's order was obtained by the second attorney, for the delivery of a signed bill by the first attorney, under the 2 G. 2, c. 23, s. 23; which delivery was accordingly made to the second attorney in the cause: and it was held by GROSE, J., LE BLANC, J., and BAYLEY, J., against the opinion of Lord ELLENBOROUGH, that this was a sufficient delivery of the bill to the party to be charged *therewith*, within the words and meaning of the statute, so as to enable the first attorney to bring his action against the client for the amount of such bill. BAYLEY, J., there says: "The act does not say that the delivery shall be to the client in person, but leaves that at large, according to what shall be deemed a delivery to the party in point of law; and then, by the general rule of law, a *delivery to an agent authorized to receive it, is a delivery to the party himself." [*880
Warren v. Cunningham, Gow's N. P. C. 71, is an authority to the same effect. So, here, when the *plea* says that there was no signed bill delivered to or left for *Hitchins*, it means that there has been no such delivery as the law requires. If it be true that a delivery of a bill to one of several joint-contractors, may enure as a delivery to one who pleads the non-delivery in the words of the statute, it is matter of evidence, and the plaintiff should have traversed the plea: *Eggington v. Cumberledge*, 1 Exch. 271.(a) [WILDE, C. J. A delivery to one of several joint-employers, is a delivery to all. *V. WILLIAMS, J.*, referred to *Oxenham v. Lemon*, 2 D. & R. 461, where it was held, that, where an attorney is retained jointly by several parties to defend a suit against each, delivery of a bill to *one* is sufficient to entitle him to maintain a joint action against all for his costs, under the 2 G. 2, c. 23, s. 23.(b)] It is a ques-

(a) And see *Blandy v. De Burgh*, 6 Man. Gr. & S. 623; *Edwards v. Lawless*, Ib. 329.

(b) Upon this demurrer, the plea, which admits a joint contract, must be regarded as the only plea pleaded. The case cited shows that a delivery to a person a delivery to whom is not here expressly negated, would be good.

tion of evidence, and not of pleading. In *Finchett v. How*, 2 Campb. 277, Lord ELLENBOROUGH says: "The act (a) does not require personal service; and a delivery of the bill to an agent or joint-contractor, may be a delivery to the party or parties to be charged. If the person to whom the bill was delivered, had not meddled with the business, though jointly liable with others who took the entire direction of it, I should hold that there was no delivery as to them. But the case is different where the bill is delivered to the person authorized by the other parties to act for them. One may reasonably suppose that he has authority to *881] receive it; and that, when received, *he will communicate it to the others." [WILDE, C. J. How can a defendant negative a delivery of a bill to persons with whom he alleges that he is improperly joined?] He clearly cannot.

Barnard, in reply. The meaning of this plea is, that no bill has been *personally* delivered to the defendant Hitchins. The plaintiff would have great difficulty in taking issue on such a plea. Suppose a bill has been delivered to J. S., one of the other defendants, and the plaintiff were to reply that: it might be that a delivery to J. S. would not be a delivery to Hitchins within the meaning of the statute. [WILDE, C. J. For the purpose of this plea, the defendant must be taken to admit the joint-contract.(b) He says, in effect, I had no signed bill delivered to me in any sense that will satisfy the statute. The statute says that the bill shall be delivered "unto the party to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house, or last known place of abode." It was not intended to alter the law as to what should be a delivery to the party. The statute has been held to be satisfied by a personal delivery of the bill to one of several co-contractors, or by leaving it at the common place of business. Why is that? Because it is a delivery to each and every of the co-contractors. What is a delivery to a co-contractor? Is not a delivery at the house of a co-contractor, a delivery to the co-contractor? And, if so, do not all the legal consequences follow? I do not see by what authority you introduce the word *personally* here.] A delivery at the common place of business, would be a delivery to all the joint-contractors: a delivery at the place of business of *one*, would not. [V. WIL- *882] LIAMS, J. Would a *delivery at the separate place of residence of one suffice?] It would not. [WILDE, C. J. What sort of delivery do you say may have taken place, which this plea does not traverse?] A delivery at the last known place of abode of *the defendants*. [WILDE, C. J. Surely, if there is a common residence of all the co-contractors, it is not the less the place of residence of Hitchins, because he possesses it in common with the others. When he says no

(a) 2 G. 2, c. 23, s. 23.

(b) The plea of non assumpsit,—by which alone the point of misjoinder could be raised,—is not set out in the demurrer-book, and could not be noticed if it were.

bill has been delivered to him, he means there has been no such delivery as the statute requires.] Suppose all the co-contractors lived at No. 1, Bridge Street, at the time the business was done, and afterwards, with the knowledge of the plaintiff, Hitchins left that house, and went to live at No. 2, and afterwards, with the like knowledge of the plaintiff, went to reside elsewhere,—a delivery of a signed bill at No. 1, Bridge Street, would satisfy the terms of this plea, but clearly it would not satisfy the statute; it would not be a delivery at the last known place of abode of *the defendants*. The difficulty cast upon the plaintiff here is, that he must, in his replication, state the particular mode of delivery, seeing that the general replication *de injuriâ* is inapplicable to such a case as this. [WILDE, C. J. I think there would be nothing unreasonable in it, if you were compelled so to do.]

WILDE, C. J. I am of opinion that the plea is a good plea, and that the defendant is entitled to judgment. The statute 6 & 7 Vict. c. 73, points out several modes in which a party may entitle himself to maintain an action in respect of the delivery of a bill. The first branch of the 37th section requires that the bill be delivered to the party to be charged therewith. But, in order to relieve the attorney from the difficulties that frequently stand in the way of a personal delivery, the statute goes on to provide that the delivery may be by sending the bill by post, or by leaving it for the *party at his counting-house, [*888 office of business, dwelling-house, or last known place of abode. Every case of delivery of an attorney's bill must satisfy one or other of these alternatives; and a plea of non-delivery, in order to be a bar to the action, must negative a delivery according to the statute. This is an action against several co-contractors. It may be that the statute has not had in its contemplation all possible modes of delivering an attorney's bill. If so, it follows, that, in every case not provided for, the delivery must be personal. The plea alleges that no bill was delivered to *the defendant*. It does not necessarily mean that he was the only person sought to be charged with the bill. There has been no compliance with the other provisions of the statute dispensing with personal delivery: the plea has, therefore, followed the terms of the statute, and negatived each and every of the several modes of delivery that would entitle the plaintiff to maintain his action. The plaintiff insists that the plea is bad; for, that there are modes of delivery of an attorney's bill, which will entitle him to maintain the action, which do not fall within either of the modes negatived: there might be a delivery within the first branch of the section, though not personal in the strict sense intended by the statute; or it might be (possibly) by a sending by post to a co-contractor; or, by a delivery at the place of business of the joint-contractors. Suppose there has been such a delivery as will satisfy the statute, under which branch of the section does it fall? Would it be a personal delivery, or a delivery by sending by post, or by leaving at the

party's place of business? It must be one of these: and all are negatived by the plea. It would seem, therefore, that a replication might be framed upon one of those modes of delivery. If there has been such a delivery as surmised, it must be a good delivery either on the ground that the bill was left at the last known place of abode or the place of

*884] *business of the defendant, within the meaning of the statute. It seems to me that the plea has negatived every delivery which could by possibility be such a delivery as to satisfy the statute. Suppose the bill were sent somewhere by the direction of one of the co-contractors, and a joint-action brought, and all the defendants were to plead no signed bill delivered according to the statute, and the delivery did not enure as a delivery as against all,—could there be a verdict for the plaintiff in the one case, and for the defendants in the others? I apprehend not: it seems to me that the plaintiff would fail altogether. The plea traversing such a delivery as will satisfy the statute, I am of opinion that it is a good answer to the action, and therefore that the defendant must have judgment.

COLTMAN, J. I am of the same opinion. The plea is to be construed with reference to the terms of the statute. The delivery may be personal, or by sending by post, or by leaving at the counting-house, office of business, dwelling-house, or last known place of abode of the party. It seems to me to be sufficient if the plea negatives these several modes of delivery. In the case put by Mr. *Barnard*,—of a delivery at that which had been the joint place of abode or business of the parties, the defendant pleading having left that place, and gone to another,—either there would be no sufficient delivery, or, if sufficient, it would be so on the ground that it amounted to a delivery within one of the modes provided by the statute. It seems to me that this plea properly negatives all that is required.

CRESSWELL, J. I am of the same opinion. The defendant Hitchins has, by his plea, negatived any delivery of a signed bill in the modes required by the statute: it negatives that the bill was delivered to the *885] defendant himself, or sent by post to, or left for him at *his counting-house, office of business, dwelling-house, or last known place of abode. It has been decided, that a denial of a delivery to the party himself involves in it a denial of a delivery to any person jointly contracting with him. It was so held in *Kiteley v Scofield*. Suppose a bill had been delivered at a house or counting-house which had been the joint house or counting-house of the defendant and the other joint-contractors, that clearly would be a delivery at *his* house or counting-house; and that is negatived by this plea. I think it is impossible to escape from this,—that a delivery at the separate house or counting-house of one of the other joint-contractors, would not be a delivery to the defendant within the statute; or, if it would be a delivery within the statute, it must be on the ground that it is in law a delivery to the party plead

ing; and that is negatived by this plea. I think the plea is a good answer.

V. WILLIAMS, J. I also am of opinion that this is a good plea. It does not consist of matter of excuse, and therefore it could not be put in issue by the general replication *de injuriâ*. If it could have been put in issue in that manner, it would have been open to the plaintiff at the trial to show any possible mode of complying with the statute. The only difficulty to my mind has arisen from the case suggested, of a bill sent to or left at the house or counting-house of a co-contractor, where the party pleading had resided, or which he had occupied, but which he had quitted, or ceased to occupy. But the answer to that obviously is, that, if such a sending or leaving of the bill is a compliance with the statute, it is on the ground of its being the counting-house or last known place of abode of the party within the meaning of the statute. I therefore think that the plea is good, and the defendant entitled to judgment.

Judgment for the defendant.

*BAYLEY v. WILKINS. May 28.

[*886

One who employs a broker to buy railway shares for him, impliedly authorizes him to do all that is needful to complete the bargain.

A. employed B., a broker and member of the Stock-Exchange, to buy shares for him. At the time of the purchase, a call had been made, but was not then payable. The seller having paid the call, in order to enable her to make a transfer of the shares, B., who by the rules of the Stock-Exchange, was personally responsible for it, paid the money:—Held, that B. was entitled to recover from A. the sum so paid, as money paid to his use.

THIS was an action of assumpsit for work and labour, money lent, money paid, and money due upon an account stated.

The defendant pleaded non assumpsit.

The cause was tried before WILDE, C. J., at the sittings in London after Hilary term, 1848. The facts were as follows:—The plaintiff was a stock-broker, and member of the London Stock-Exchange. The defendant was a publican residing at Swansea, in the county of Glamorgan. On the 22d of March, 1847, the defendant addressed a letter to the plaintiff, as follows:—

“Dear sir,—I see Vale of Neath shares quoted 30s. discount. Will you buy me twenty shares at that price,—one shilling more or less. Do the best you can.”

On the 30th of March, the plaintiff purchased on the defendant's account, twenty Vale of Neath shares at 30s. discount, communicating to him the fact of the purchase in the following letter:—

“Dear sir,—I am in receipt of your favour, and have now the pleasure to report the purchase of twenty Vale of Neath shares, at 1½ discount, which I trust may prove satisfactory. Contract enclosed.”

Enclosed in this letter was a memorandum of the contract as follows :—

*887] “Bought, for and on account of E. Wilkins, Esq., twenty shares in the Vale of Neath Railway, for the 31st :—

£2	0	0	paid			
0	0	0	premium			
1	10	0	discount	£	s.	d.
<hr/>						
£0	10	0	per share =	10	0	0
			Commission	1	0	0
<hr/>						
				£11	0	0”

The price of the shares and commission (11*l.*) was remitted to the plaintiff on the 3d of April; and, on the 5th, the plaintiff acknowledged the receipt of it, and promised to send the scrip as soon as possible.

On the 6th, the plaintiff addressed the defendant as follows :—

“Dear Sir,—Herewith I have the pleasure to wait upon you with the transfer of twenty Vale of Neath Railway shares, ‘Bennett to yourself.’ I am able to hand you, under separate cover, the certificates, as the office will register the transfer unaccompanied by the certificates. Should you return to me the transfer for registration, I shall have to debit you the fee of 2*s.* 6*d.*”

At the time the shares were purchased, a call had been made of 2*l.* per share, payable on the 12th of April, of which no mention was made. On the 7th of April, one Fowler, who had acted as the broker for Miss Bennett, the seller of the shares, applied to the plaintiff for the amount (40*l.*), which he informed him his principal had paid on the 31st of March. The plaintiff thereupon wrote to the defendant, as follows :—

*888] “Dear Sir,—The seller of the twenty Vale of Neath shares transferred to you, has paid the call of 2*l.* per share due on the 12th instant. Be good enough to transmit it to me, that I may hand it to her. Paid, 31st of March.”

The defendant not replying to this application, the plaintiff paid the 40*l.* to Miss Bennett’s broker, on the 9th of April,—in conformity with a rule of the Stock Exchange (which all members are compelled to observe, on pain of expulsion), which directs, that, if a call has been made on registered shares, the seller may pay the same though not due, and may claim the amount of the purchaser; and, on the 13th, he wrote to the defendant, informing him that he had done so.

On the 17th of April, the defendant wrote to the plaintiff, repudiating the payment made to Miss Bennett, and observing that it was irregular to pay calls when the shares were in the market, and suggesting that he should call on Miss Bennett to return the money; in reply to which letter, the plaintiff, on the 19th, informed the defendant of the rule of the Stock Exchange above referred to.

After the commencement of the action, *viz.* on the 4th of November,

the defendant wrote to the plaintiff's attorney, offering to pay the 40*l.*, if he would give him time.

Under the direction of his lordship, the jury found for the plaintiff, damages 40*l.*,—the verdict being taken on the count for money paid only, and leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that money paid would not lie under the circumstances; and to the plaintiff to move to enter a verdict on the account stated, if it should become necessary.

Channell, Serjt., in Easter term, 1848, accordingly obtained a rule nisi, on behalf of the defendant.

**Byles*, Serjt., and *Phinn*, now showed cause. By the 16th section of the 8 & 9 Vict. c. 16, it is enacted, that, "no share-
holder shall be entitled to transfer any share, after any call shall have been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him." Miss Bennett, therefore, could not comply with the defendant's demand of a transfer, until she had paid the call of 2*l.* per share which was made on the 4th of February, and then due, in the sense of being charged upon the shares: *Shaw v. Rowley*, 16 M. & W. 810, per PARKE, B. And it was proved at the trial, that, by a rule of the Stock-Exchange, if a call has been made upon registered shares, before the transfer, the seller is authorized to pay the same, although not yet due, and may call upon the purchaser to reimburse him; and that, if the purchasing broker omits to pay, he is liable to be expelled the house. [WILDE, C. J., referred to *Child v. Morley*, 8 T. R. 610, where it was held that a broker who contracts with others for the sale of stock at a future day, by the authority of his principal, who afterwards refuses to make good the bargain, cannot, by paying the difference to such third persons, entitle himself to maintain an action on an implied assumpsit against his principal for the amount.] It has since been settled, both in the court of Queen's Bench and in the Exchequer, that one who employs a broker to buy shares for him on the Stock-Exchange must be held to be cognisant of, and bound by, the rules of the establishment. In *Bayliffe v. Butterworth*, 1 Exch. 425, the defendant, who resided some distance from Liverpool, authorized the plaintiff, a broker there, to sell for him twenty railway scrip shares: the plaintiff sold them to C., another broker of Liverpool: the scrip shares were *not delivered on the day, and C. bought twenty other scrip shares at the market price, and claimed the difference between the contract and the market price: the plaintiff paid him the difference, and brought an action for money paid, to recover this sum: it was proved to be the usage amongst brokers at Liverpool to be responsible to each other upon these contracts; and there was evidence that the defendant was cognisant of this usage: it was held that the defendant was liable. PARKE, B., there says: "I consider it to be clear law, that, if there is, at a particular place, an estab-

lished usage in the manner of dealing and making contracts, a person who is employed to deal or make a contract there, has an implied authority to act in the usual way; and if it be the usage that he should make the contract in his own name, he has authority to do so. Supposing it were necessary to show that the defendant knew of the particular usage, the point should have been made at the trial; and, in the present case, there was evidence for the jury to find that the defendant did know of it, and that he was responsible. It is not now necessary to decide the point whether the defendant would be bound if he did not know of such a usage. It appears to me, however, that a person who authorizes another to contract for him, authorizes him to make that contract in the usual way. There are some cases which look the other way, which have not been noticed." And, after referring to *Bartlett v. Pentland*, 10 B. & C. 760, and *Gabay v. Lloyd*, 3 B. & C. 793, 5 D. & R. 641, and distinguishing them, the learned judge proceeds: "I have said this, in order to show my concurrence in the opinions expressed by Lord DENMAN and LITLEDALE, J., in the case of *Sutton v. Tatham*, 10 Ad. & E. 27, 2 P. & D. 308, although it is not *891] necessary to determine the same point here, as there was sufficient evidence to show that the defendant knew the usage of the Stock-Exchange at Liverpool, if it were requisite to prove it in order to make him liable." So, in *Pollock v. Stables*, 17 Law Journ. N. S., Q. B. 352, the plaintiff, a share-broker at Leeds, bought for, and by the orders of, the defendant ten railway shares, to be paid for on delivery: the shares were delivered, and had fallen in price between the time of the sale and the delivery: the defendant not being able to pay at the time of delivery, the vendor demanded the shares back from the plaintiff, who gave them back to the vendor, who sold them at the then market price, and called upon the plaintiff, according to the usage of the Stock-Exchange at Leeds, to pay the difference, which he did: and it was held that the plaintiff was entitled to recover the sum so paid, from the defendant, as money paid to his use, as he must be taken to be cognisant of the usage of the Stock-Exchange which his broker attended. Lord DENMAN there says: "The case of *Bayliffe v. Butterworth* is not, we think, distinguishable in principle from the present. That decision is in accordance, as far as the circumstances are parallel, with the case of *Sutton v. Tatham*." [WILDE, C. J. In *Scott v. Irving*, 1 B. & Ad. 605, an assured residing at Glasgow, employed an insurance-broker in London to recover a loss from the underwriter: the loss was settled in part by the underwriter setting off in account against it, a debt due to him from the broker for premiums, and, as to the residue, by his paying the broker in cash, and the underwriter then erased his name from the policy: the broker became bankrupt and never paid the loss to the assured: evidence *892] was given of a usage, that, on adjustment, *payment was generally in a month, and that the practice between the broker and the underwriter, was, to set off in account between them the amount of

premiums due to the underwriter, against the loss: and it was held that the underwriter was not entitled to treat the set-off in account between him and the broker, as payment to the assured, the latter not being bound by a usage of which he was not shown to be cognisant. That case has never, that I am aware of, been overruled. *MAULE, J. Scott v. Irving* is the last of a series of cases, beginning with *Russell v. Bangley*, 4 B. & Ald. 395, which went upon the ground of the unreasonableness of paying the debt of one with the money of another, as was said by the court, in *Todd v. Reid*, 4 B. & Ald. 210.] In *Sutton v. Tatham*, *LITTLEDALE, J.*, says distinctly and without doubt, that "a person who employs a broker, must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed." [*WILDE, C. J.* I rather think Mr. Justice *LITTLEDALE* was not aware that he was overruling a decision of the court after argument.] In paying the amount of the call, the plaintiff acted in obedience to the custom of the Stock-Exchange: he was bound by that custom, and authorized by the nature of his employment by the defendant, to do as he did. [*CRESSWELL, J.* Does not this resolve itself into the case of an erroneous account sent by the broker to his principal?] *Dails v. Lloyd*, 17 Law Journ. N. S., Q. B. 247, was a case of that description. There, the defendants, who were share-brokers at Liverpool, on the 30th of August, 1845, bought for the plaintiff, who was also a share-broker, thirty-eight Tean and Dove Valley Railway shares, at the price, according to the advice-note, of 2*l.* 8*s.* 6*d.* **per share*: the scrip had not then issued, and the 2*l.* 8*s.* 6*d.* was therefore premium: the deposit of 1*l.* 7*s.* 6*d.* *per share* first [*893 appeared in the printed share lists (which were sent daily to the plaintiff) on the 2d of September, and the amount of such deposits (41*l.* 5*s.*) was paid by the defendants to the persons from whom they bought the shares: in an account sent by the defendants to the plaintiff on the 19th of September, they omitted to charge the sum paid for the deposits, and the plaintiff, who purchased for other persons, as broker (though he dealt with the defendants as principal), only charged 2*l.* 8*s.* 6*d.* *per share*, and had settled accounts with such other persons on that footing before any claim was made for the deposits. The defendants also, on the 18th of September, bought for the plaintiff eighty South Staffordshire Railway shares, at the price, according to the advice-notes, of 4*l.* 10*s.* *per share*: the 4*l.* 10*s.* *per share* did not include the deposit of 2*l.* 10*s.* *per share*, which first appeared in the share lists about the 26th of September; and, in settling with the vendors, the defendants paid them the deposits, amounting to 200*l.*, in addition to the 4*l.* 10*s.* *per share*: but, on the 26th of September, the shares were sold by the defendants for the plaintiff at 7*l.* *per share*, which sum included the deposits, and the plaintiff was credited with the full amount: in an account furnished to the plaintiff by the defendants on the second of October, and also in subsequent accounts,

the plaintiff was only debited with the 4l. 10s. *per share*, and he only debited his principals with that amount, and settled with them on that footing. On the 19th of November, the defendants, having received a letter from the plaintiff demanding a balance of 605l. 14s. 10d., examined their books, and discovered the mistake with regard to the deposits, and immediately acquainted the plaintiff with it: and it was held that *894] they were entitled to set off the 200l., and also *the 41l. 5s. Lord

DENMAN, in delivering the judgment of the court, said: "The precise nature of the dealing between the plaintiff and his principals, does not appear upon the case; nor is it stated that the scrip was ever transferred by the plaintiff; for all that appears, it may have been a mere time bargain, and the scrip may still be in the hands of the plaintiff. If the scrip was actually transferred by the plaintiff, he must have known, or ought to have known, that the price he paid was premium merely, and could not have included any sum paid for deposit. In either view of the case, we think that the defendants are entitled to set off the amount, *which, by the course of business, they were bound to pay*, in order to procure the scrip, beyond the premium; and that the omission to debit the plaintiff with such payment in their account, does not take away their right. They dealt with the plaintiff as the principal in the transaction, and are not concluded by having, by mistake, omitted to charge him with a payment of which he has had the benefit, by the actual possession of the scrip, which could only have been obtained by the payment in question. The case of *Sutton v. Tatham*, as well as the other cases cited in the argument, (a) are consistent with the view we take of the case; and our judgment, therefore, is in favour of the defendants." [MAULE, J. *Dails v. Lloyd* was a

*895] case of estoppel *in pais*,—like *Brisbane v. Dacres*, 5 Taunt. 143, and that class of cases.] The defendant was bound to pay the call, and might have been compelled, by a bill in equity, to execute and register the transfer-deed: *Wynne v. Price*, 12 Law Times, 531. In *Grisewood v. Justice*, 13 Law Times, 22, one J. agreed to purchase fifty shares in a railway company, at ten guineas a share, the same being a premium of 8l. a share, the sum of 2l. 10s. having been paid for calls: G., the plaintiff, afterwards delivered to the broker fifteen of the shares, upon which such calls had been made, when he refused to accept them, and asked for a return of the purchase-money from the brokers, which they declined, on the ground that the calls had already been paid on the fifteen shares, but not on the remaining thirty-five: by a deed of assign-

(a) The cases cited were,—for the plaintiff *Skyring v. Greenwood*, 4 B. & C. 281, 6 D. & R. 401; *Marriot v. Hampton*, 7 T. R. 269 (2 Smith, L. C. 241); *Bramstone v. Robins*, 4 Bingh. 11, 12 J. B. Moore, 68; *Shaw v. Dartnall*, 6 B. & C. 56, 9 D. & R. 54; *Thomas v. Hawkes*, 8 M. & W. 40; *Cox v. Prentice*, 3 M. & Selw. 344; *Heane v. Rogers*, 9 B. & C. 577, 4 M. & R. 486; *Pickard v. Sears*, 6 Ad. & E. 469, 2 N. & P. 488; and *Gregg v. Wells*, 10 Ad. & E. 90, 2 P. & D. 296; and, for the defendants, *Fletcher v. Marshall*, 15 M. & W. 755; *Sutton v. Tatham*, 10 Ad. & E. 27, 2 P. & D. 308; *Bayliffe v. Butterworth*, 1 Exch. 425; and *Willoughby v. Backhouse*, 2 B. & C. 821, 4 D. & R. 539.

ment, the plaintiff had transferred the thirty-five shares to J., but, he not being registered, the plaintiff was obliged to pay 361*l.* in respect of calls, and the defendant refused other shares as a substitute for the fifteen: it was held that the representative of J. (then deceased) was bound specifically to perform the contract, by taking fifty shares, and paying the amount of calls which had been paid by the plaintiff.

Humble v. Langston, 7 M. & W. 517, and *Bowlby v. Bell*, 3 Man. Gr. & S. 284, will probably be relied on for the defendant, to show that the broker was not liable in respect of the call in question. In *Humble v. Langston*, the facts were these:—On the 20th of February, 1838, the plaintiff entered into a contract with the defendant, through their respective brokers, for the sale of thirty shares in the Bristol and Exeter Railway, at 7*l.* 5*s.* *per* share, and the usual contract-notes passed between the parties, no time being mentioned for the completion of the purchase: *on the 3d of March the defendant wrote to the plaintiff's brokers, requesting them to "despatch the thirty Bristol and Exeter shares forthwith," and they replied on the same day, "we herewith send you transfer of thirty Bristol and Exeter shares *in blank*:" this was accordingly done, and the purchase-money was paid: calls were subsequently made, which calls, the shares not being registered in the name of the defendant, and the plaintiff remaining the apparent owner of them, the latter was compelled to pay: in an action against the defendant for not indemnifying the plaintiff for the payments and liabilities in respect of the calls,—it was held, that, under the above circumstances, there was no undertaking implied by law, to indemnify against all subsequent calls, nor any evidence of such an undertaking in point of fact. [MAULE, J. That looks very much like an attempt on the part of the broker of the purchaser to accommodate his brother broker at his principal's expense.] PARKE, B., there says: "On the 20th of February, 1838, the contract was entered into, which was simply an agreement by the plaintiff to sell, and the defendant to buy, thirty shares, at the price of 7*l.* 5*s.* *per* share, no time being specified for the completion of the purchase; nor was there any such stipulation in the contract as the conveyance itself would have contained if completed, that is, that the vendee should be subject, from the date of it, or any future time, to the conditions upon which the vendor held them. If the case had rested upon this contract, the situation of the parties would have been this:—The plaintiff, after showing a good title to the defendant, would have had a right to call upon him to complete his purchase in a reasonable time, by preparing a deed in the statutory form; and, if the defendant had done so, the plaintiff might then have executed it, and required the defendant to do the same, and to deliver, or attend with him to *deliver, the deed to the company, that a memorial might be entered into and endorsed on the deed of transfer, pursuant to the 169th section. If all this had been done, the plaintiff would have been

no longer liable to any call: if the defendant had refused to perform his part, he would have subjected himself to an action for the non-performance of that which he had omitted to do; and if, in consequence of the defendant's breach of his contract, the plaintiff had been obliged to pay future calls, he might have recovered this amount, by way of special damage for the defendant's breach of contract. But, in this case, the plaintiff did not pursue the course, which, according to law, he ought to have done." That, therefore, was simply a case of omission on the part of the selling broker, to do that which was necessary in order to enable him to call upon the purchaser to repay him the amount paid for calls. The same remark applies to *Bowlby v. Bell*. There, A., a share-broker, on the 28th of July, 1845, contracted to sell to B. certain railway shares belonging to C. The scrip having been sent to the company's office for registration, and A. being consequently unable to deliver the shares, B., on the 23d of September, purchased other shares at an advanced price, and claimed the difference from A. A. accordingly paid him the amount, after notice from C. not to do so,—one of the rules of the Hull Stock-Exchange, of which A. and B. were both members, declaring brokers to be personally responsible for the fulfilment of their respective contracts with each other,—and claimed to be recouped the same by C. as money paid to his use. The price of the shares had not been offered to C., nor had any transfer been tendered to him for execution: and it was held that the action was not maintainable. Neither of these cases has any bearing upon the present. [WILDE, C. J. I feel some difficulty in saying that a man who buys shares, buys subject to *the rules of the Stock-Exchange, of which he may not be cognisant. And there is this further difficulty, that those rules are framed by, and are to receive their construction from, a body that is totally independent of the rules of law, and irresponsible.] *Brittain v. Lloyd*, 14 M. & W. 762, where all the authorities are collected, is distinct to show that an action for money paid will lie, under the circumstances of this case: it was there held that that form of action is maintainable in every case in which the plaintiff has paid money to a third party, at the request, express or implied, of the defendant, with an undertaking, express or implied, to repay it.

Channell, Serjt., in support of his rule. The material facts upon which the defendant relies, are these:—The order for the purchase of the shares was given on the 22d of March. On the 30th, a bought-note was sent to the defendant, making the sum payable by him for the shares and commission 11*l*. On the 31st, the seller of the shares paid a call of 2*l*. per share thereon. Down to this time nothing appears to have been paid by the plaintiff. On the 5th of April,—the day on which the transfer was dated,—the plaintiff acknowledges the receipt of the 11*l*. from the defendant; on the 6th the certificates are sent to the defendant; and it is not until the 7th that any intimation is given to the defendant of the

call having been paid by the seller, or of his liability to repay the amount to her. The authority of the broker was clearly at an end before he took upon himself to pay the 40*l.* to Miss Bennett. The Stock-Exchange had no jurisdiction in the matter. *Bayliff v. Butterworth and Pollock v. Stables* only show that the brokers are responsible to each other for differences in the case of unexecuted contracts. *Sutton v. *Tatham* is [*899 in substance a case of the same description. In *Dails v. Lloyd*, the question was one of estoppel only,—whether the defendants were bound by the mistake they had made in the account delivered by them. *Wynne v. Price and Grisewood v. Justice* do not tend to throw any light upon the question. In *Shaw v. Rowley*, the plaintiff's liability to pay the calls was not *directly* before the court. *Bowlby v. Bell* is a distinct authority to show that this action is not maintainable. *Fowler, Miss Bennett's* broker, was not liable to his principal for the 40*l.* paid by her; nor could he have recovered it from the present plaintiff; and, if so, there is no pretence for saying that the plaintiff could enforce it as against the defendant.

The opinions of *LITTLEDALE, J.*, in *Sutton v. Tatham*, and of *PARKE, B.*, in *Bayliffe v. Butterworth*, as to parties unconnected with the Stock-Exchange being bound by its rules, though not shown to be cognisant of their existence, were altogether extrajudicial; and they are clearly opposed to the doctrine laid down in *Child v. Morley*, *Scott v. Irving*, *Bartlett v. Pentland*, *Gabay v. Lloyd*, and many other cases. The question is, whether this court will, in deference to those *dicta*, overturn a long series of deliberate decisions.

WILDE, C. J. This case is not free from difficulty; but, upon the whole, I think the plaintiff is entitled to retain his verdict. The contract was for the purchase by the plaintiff for the defendant of twenty Vale of Neath Railway shares at 30*s.* discount. The object of the purchaser was, to obtain the shares, with all the responsibilities that legally attached to them, at a deduction of 30*s.* from the 2*l.* which had been paid as a deposit on the original allotment: and he was liable, therefore, to pay such sum beyond the stipulated price as the regulations of the company subjected the shares *to. He has got what he intended [*900 to buy. Supposing the present plaintiff to be the proper person to sue, on what ground is it that the defendant is sought to be charged with the 40*l.*? He contracted to buy the shares at a certain price. He must, therefore, have contemplated taking them subject to such charges as the rules and regulations of the company authorized, whenever they should happen to be imposed upon them. He calls for a transfer. What was necessary to be done by the former holder of the shares in order to effect a transfer? The call of 2*l. per* share must be paid either by the purchaser or by the party transferring. It is true, that the call was not payable until the 12th of April, and that the defendant might have delayed the payment of it until that day, by forbearing to require an earlier

transfer. Being called upon to make the transfer, Miss Bennett, to enable her to do so, and thus get rid of the transaction, pays the call of 2*l.* *per* share. She clearly did not contemplate selling at 10*s.* *per* share what she knew she was compellable to pay 40*s.* *per* share additional for before she could perform her contract. What did the defendant contemplate he had to pay? Why, at some time or other, all that had already been paid, or that was chargeable upon the shares, except the 30*s.* discount. I observe, that, in his letter of the 17th of April, the defendant says that it was irregular to make payment of the call whilst the shares were in the market. One does not exactly see what that means: but this is clear, that the defendant does not affect to say that he was ignorant of the fact of a call having been made. The 40*l.*, then, was a sum that was necessarily paid by Miss Bennett, in order to enable her to make a transfer of the shares to the defendant. What is the contract the defendant must be understood to have entered into with his broker? What did he authorize the broker to do? To perfect the transaction.

*901] *Less than that would be unavailing. He was to do the needful. The plaintiff, at the defendant's request, makes the purchase for him, dealing as a broker at the Stock-Exchange, and according to the rules of that establishment, where brokers deal with each other as principals. There is nothing in the present case to show that the defendant contemplated that his name was to be introduced into the transaction. How do parties deal, who do not disclose the names of their principals? Why, upon their own individual responsibility. It is reasonable to suppose that the very consequence should take place which the rules of the Stock-Exchange contemplate. The plaintiff, acting in the usual, and probably the only proper, course of his business as a broker, pays the money. I have looked narrowly to see upon what ground it was that the defendant repudiated the payment. But I do not find that he does repudiate the plaintiff's authority to make the payment. On the contrary, he intimates that he is making arrangements to induce the party to whom he had sold the shares, to pay the call. The letter of the 4th of November, though written after action brought, may be very good evidence to show upon what footing the parties had previously been dealing. An admission made on the morning of the trial, would be evidence to that extent. I infer from the whole transaction that the defendant intended that the plaintiff should act as his agent. Has, then, the plaintiff paid the money under such circumstances as to disentitle him to recover it back? He dealt with the broker of Miss Bennett as a principal. If he were authorized by the defendant to do so, would not the latter be bound by his acts, independently of any regulations of the place where the business was transacted? Without, therefore, entering minutely into a consideration of the effect of the rules of the Stock-

*902] Exchange, when I find parties dealing together as principals, with *the consent and authority of those who employ them, I take it

that all the consequences resulting from such a mode of dealing, must follow from the original authority. It is quite clear that the selling broker might have maintained an action against the buying broker to recover the amount of the call, the payment of which was necessary to enable him to make the transfer: the remedy provided by the rules of the Stock-Exchange to enforce this, is merely cumulative. As between the two brokers, there was evidence that they dealt as principals. The defendant bought the shares subject to all the consequences legally attaching to them. He is now called upon to bear one of those consequences. He resists, on the ground that he was ignorant of the fact of a call having been made at the time he contracted to buy the shares. His broker probably was equally ignorant of the fact. But he knew that calls *would* be made: and I think the fair result is, that he authorized the plaintiff to act as principal on his behalf, and to incur the liability, and make the payment which he has been compelled to make. I therefore think,—although I am free to admit that I feel the case not to be absolutely void of doubt,—that the plaintiff is entitled to recover.

COLTMAN, J. It seems to me that this case is not attended with any doubt at all. A person who goes into the Stock-Exchange to buy shares, must be supposed to have a knowledge of the usual course of business there, and of the law applicable to it. When a man buys railway shares, he must be assumed to know, that, by the operation of the 8 & 9 Vict. c. 16, s. 16, he cannot obtain a transfer until all calls in arrear have been paid. What was the contract here? The defendant contracted to buy twenty Vale of Neath shares, at 30*s.* discount. What does that mean? Why, that *he* will pay all the calls already paid or charged upon the shares, subject only to a deduction of 30*s.* *per* share from the amount. That the defendant so understood the contract, is clear from the subsequent correspondence: he does not deny his liability to pay the call in question, but only asks for time. Without any reference to the rules of the Stock-Exchange, the plaintiff having, at the request of the defendant, rendered himself liable to be sued for the amount of the call paid by Miss Bennett, he has been compelled to pay money which his principal was bound to pay, and therefore an action well lies to recover it back as money paid to his principal's use.

MAULE, J. I also think the plaintiff in this case is entitled to recover the 40*l.*, as money paid by him to the use of the defendant. The construction of the defendant's order is very plain. He desires the plaintiff to buy for him twenty Vale of Neath shares, at 30*s.* discount. The meaning of that is, that the purchaser is to become the owner of the shares, upon payment, not of 100*l.* *per* share, the nominal value, but of all such sums as the prior holders may have paid or become liable to pay in respect of them, less 30*s.* The authority, therefore, given to the plaintiff as broker enabled him to buy the shares, and to incur a liability to pay all that had been paid upon them, or that they then stood charged with,

less 30s. The defendant does not, throughout the transaction, repudiate or deny that authority. The plaintiff having been employed as broker to do what was necessary to procure a transfer of the shares, and having paid to the vendor a call which she had been compelled to pay before a transfer could be effected, I think he did nothing more than he was bound to do, and was necessarily done, to complete the transaction which *904] the defendant had authorized him to *enter into on his behalf. If so, a good case as for money paid to the defendant's use is made out. Looking at the correspondence only, seems to me clearly to establish a good case for money paid. The letter of the 4th of November, if written before action brought, would have been good evidence of an account stated. But, how stands the case with reference to the former part of the correspondence? On the 7th of April, the plaintiff informs the defendant that the call of 2*l.* *per* share, due on the 12th, has been paid by the seller, and requires him to remit the amount: and on the 13th,—the day after the call was payable,—the plaintiff again writes to the defendant, and tells him that he has paid the 40*l.* to Miss Bennett's broker. The defendant is, therefore, without the excuse suggested. He is not called upon to pay the call until after the time at which the company were in a condition to enforce it. In the defendant's letter to the plaintiff, of the 17th of April, in which he makes the preposterous proposal to him to endeavour to get the money back, not a word is said as to his non-liability to pay the call. Then, on the 4th of November, he writes to the plaintiff's attorney, asking for time. There was ample evidence to show that the money was paid by the plaintiff on account and to the use of the defendant, before the commencement of the action.

CRESSWELL, J. I entirely agree with the rest of the court in the view they take as to the authority given by the defendant to his broker, and that the latter acted within the scope of his authority. It is satisfactory to find, from the defendant's letters, that he himself took the same view of the matter. The cases of *Bowlby v. Bell* and *Humble v. Langston*, in reality, do not apply at all. In *Humble v. Langston*, the defendant had bought shares of the plaintiff, but refused to accept a *905] *transfer; the plaintiff, having been compelled to pay calls subsequently made, claimed to be entitled to an indemnity from the defendant, upon some supposed implied undertaking. I was unable to collect from the equity cases cited, whether they are at all at variance with that case. If the plaintiff had been compelled to pay calls for which the defendant was liable, no doubt he might have sued in respect of the special damage. As to *Bowlby v. Bell*, the case was shortly this:—The defendant authorized the plaintiff to sell for him *registered* shares. All parties at the time of the contract knew that the shares were then sent in for the purpose of being registered. The purchaser, without offering to pay for the shares, or tendering a transfer for execution, either to the seller or his broker (the plaintiff), bought other shares, and claimed and

received the difference in the price from the plaintiff, who sought to recover it from his principal, as money paid to his use. But the court said: "If the contract was for unregistered shares, the plaintiff was not authorized to make it: and, if for registered shares, Richardson (the buyer), not having tendered a transfer, was not in a situation to proceed against the plaintiff; and, consequently, the payment by him was in his own wrong, and did not give him a right of action against the defendant for money paid to his use." The question there was quite independent of any rules of the Stock-Exchange. Rule discharged.

***WOOD v. The Governor and Company of COPPER MINERS** [*906
in ENGLAND. *May 30.*

No precise form of words is necessary to constitute a covenant: it is enough, if the intention of the parties mutually to contract, is apparent from the general scope of an instrument under seal,—more especially, where it commences with the words "it is hereby agreed by and between the said parties in manner following."

By an instrument under seal, expressed to be made and entered into between the defendants and the plaintiff, it was "agreed by and between the parties," amongst other things,—that the defendants should grant a lease of certain premises to the plaintiff, for twelve years, at a peppercorn rent, for the purpose of the plaintiff's carrying on therein the manufacture of patent-fuel,—that all the coals consumed and used by the plaintiff for the purpose of his manufacture during the term, should be bought and purchased of the defendants, provided the defendants *could and should* supply him with the quantity that should from time to time be required by him, or to such extent as the defendants *could* supply, and that the defendants should charge for the same a given price, *and no more*,—and, further, that the defendants should not be compelled to supply more than 500 tons *per week*, and that, in case the defendants should, from some substantial cause, be unable to supply small coal *to the extent agreed upon*, they should give the plaintiff six months' notice of such their inability, and in such case the plaintiff should be at liberty to obtain his supply of coal, or the excess beyond the quantity the defendants could supply, from any other source:—

Held, that this instrument was properly declared upon as a *covenant* on the part of the defendants to supply the plaintiff with coal to the extent of 500 tons weekly, unless unable from some substantial cause.

THIS was an action of covenant. The declaration stated, that, therefore, to wit, on the 21st of July, 1847, a deed was made and entered into by and between the defendants of the one part and the plaintiff of the other part,—profert,—and the said deed was and is to the tenor and in the words and figures following, that is to say, "An agreement made and entered into the 21st day of July, 1847, between the Governor and Company of Copper Miners in England (meaning the defendants) of the one part, and H. W. Wood (meaning the plaintiff), of, &c., manufacturer of fuel, of the other part: Whereas, the said H. W. Wood has lately erected a factory, works, and buildings on *part of a certain piece of land, containing, &c., belonging to the said governor and company, situate at Port Talbot, in the county of Glamorgan, Sth Wales, for the purpose of carrying on the manufacture of patent fuel; And whereas the said governor and company have advanced and paid to the

said H. W. Wood, for and towards the erection and completion of the said factory, works, and buildings, and the machinery therein, divers sums of money, amounting in the whole to the sum of 2500*l.*: And whereas the said governor and company have agreed to grant a lease of the said piece of land, and the manufactory and buildings, and other the premises, to the said H. W. Wood, and to enter into certain other arrangements for the supply of coal for the said manufactory, and otherwise, on the terms and conditions hereinafter mentioned: Now, these presents witness, and it is hereby agreed by and between the said parties in manner following, that is to say,—*First*, That the said governor and company shall grant a lease of the said plot or parcel of land, with the manufactory, buildings, and machinery thereon, to the said H. W. Wood, for the term of twelve years from the 25th of March last, at a peppercorn rent; such lease, and a counterpart thereof, to be prepared at the expense of the said H. W. Wood: *Second*, That, immediately upon such lease being so granted by the said governor and company, he, the said H. W. Wood, shall execute an assignment thereof by way of mortgage to the said governor and company, or their trustee, as a security for the repayment of the said sum of 2500*l.*, with interest after the rate of 5*l. per cent. per annum*, within seven years from the date thereof; such mortgage to contain a power of sale, and all other usual powers: *Third*, That the patent fuel manufactured by the said H. W. Wood, on which he may require an advance, shall from time to time be placed and *908] laid upon a *certain piece of land which shall be adjoining to the said piece of land hereby agreed to be demised, but divided off for that purpose and for the purpose next hereinafter mentioned, and shall there be and remain in the possession of the said governor and company, as a security for any moneys at any time due and owing to the said governor and company by the said H. W. Wood on any account whatsoever, excepting the said sum of 2500*l.* under or by virtue of this agreement: provided, nevertheless, that such deposit of fuel, and such advance or advances, shall in no way prevent or prejudice the sale of fuel from time to time by the said H. W. Wood, who for that purpose shall have full liberty to ship or give delivery orders for the same; the said H. W. Wood in that event depositing or agreeing to deposit with the said company the cash, or approved bills, to be received by him as the price of or advance upon such fuel, when and as the same shall be sold: *Fourth*, That *all the coals consumed and used by the said H. W. Wood for the purpose of his manufacture, during the said term of twelve years, shall be bought and purchased of the said company*, provided the said company *can and shall* supply him with the quantity that shall from time to time be required by him, or to such extent as the said company *can supply*; and that the said company shall charge for the same at and after the rate of 3*s.* 10*d. per ton*, delivered over the weighbridge on the premises of the said H. W. Wood, at Port Talbot aforesaid, *and no more*

the said coal to be that which is clean and good for the purpose of manufacturing steam fuel, and to be that which is known as small coal unscreened, unless passed through a screen of longitudinal bars not less than four inches apart; and that the said H. W. Wood shall use and consume no other coal at the said factory, during the said term, than that which is bought and purchased of the said company, excepting *nevertheless, in the event of the said H. W. Wood requiring [*909 more small coal than the said company *can and shall* supply him with, and excepting nevertheless, for the purpose of making experiments, in the manufacture of fuel, in which case the said H. W. Wood is to be at liberty to purchase and consume coal not being the company's coal, such purchases and consumption of coal for the purposes of experiment not to exceed fifty tons in quantity from any six collieries in any one year: Fifth, That *the said company shall not be compelled to supply more than five hundred tons per week*; and that, in case the said company shall, from some substantial cause, be unable to supply small coal *to the extent agreed upon*, the said company shall give to the said H. W. Wood six months' notice of such their inability, and, in such case, the said H. W. Wood shall be at liberty to obtain his supply of coal, or the excess beyond the quantity the said company can supply, from any other source: Sixth, That all coal supplied to the said H. W. Wood by the said company, shall be delivered over the weighbridge erected at Port Talbot aforesaid, at the said patent-fuel works, at the rate of 3s. 10d. *per ton*, including the use of trams, wagons, haulage, and other necessary incidental expense, to the weighing-machine, and the use of trams from the weighing machine to the manufactory, such further haulage to be at the expense of the said H. W. Wood; and the said H. W. Wood shall, if he shall so think fit, be at liberty to pass the said coal over a screen of longitudinal bars not less than half an inch apart; and all coal which will not pass through such screen shall be deemed rubble coal, and shall be taken back by the said governor and company within fourteen days after notice in writing shall have been given as next hereinafter is mentioned, and paid for by them, in cash, at the rate of 1s. 6d. *per ton*, at the periods hereinafter specified for the rendering accounts of all coal *delivered: Seventh, That the said company shall supply to the [*910 said H. W. Wood, *in lieu and in place of the rubble coal so returned, free of cost and expense to him, an equal quantity of the coal hereby agreed to be delivered*, within fourteen days after notice in writing shall have been given, specifying as nearly as is practicable the quantity so to be removed; and, *in case the said company shall neglect to remove the said rubble coal, and to replace the same with such coal as aforesaid*, within the time aforesaid, they shall pay to the said H. W. Wood, the sum of 2l. *per diem*, to be recovered as liquidated damages: Eighth, That, if the said coal shall not be of such quality of small coal as is required by the said H. W. Wood, and fit for the purposes of the manufacture, the

same shall be notified to the said company within fourteen days after the same shall have been delivered, otherwise the same shall be deemed and taken to be good and sufficient for the purposes, and shall be charged for accordingly ; but in case the said H. W. Wood shall give notice to the said company, within the said period of fourteen days, that the said coal is not good and fit for the purposes of the manufactory, then the said company shall either take back the same, or shall, within seven days after such notice shall have been delivered, refer the question to the decision of an individual to be agreed upon between them and the said H. W. Wood, or, in case they cannot agree, shall give the name of a referee, who, together with a referee to be named by the said H. W. Wood, or such third party as such two referees shall appoint, shall award and determine whether such small coal be good and sufficient for the purpose of such manufacture, and as agreed for ; and, in either of the said cases, the said company and the said H. W. Wood shall be mutually bound by such decision : Ninth, That the said H. W. Wood shall be at liberty to erect a shipping-stage, adjoining the *911] said fuel *manufactory, on the river Avon, and the said company shall contribute towards the cost and expense of erecting the same, when and after the same shall have been erected, a sum not exceeding 50*l.*, and shall also allow the said H. W. Wood to make use of some one of their shipping-stages and weighing-machines for the purpose of shipping patent-fuel, or receiving pitch, in regular turn according to the stemming-list, due diligence being at all times used on the float at Port Talbot aforesaid, free of charge: Tenth, that the account for all coals delivered by the said company to the said H. W. Wood, after the rate of 3*s.* 10*d.* per ton, shall be rendered to the said H. W. Wood every three months, and shall include all coals delivered during that period ; and, if no objection be stated to such account within ten days after the same shall have been delivered, the same shall be taken (errors excepted) as a correct account, and the said H. W. Wood shall be debited, on the tenth day of the succeeding month, with the amount found to be due to the said company upon such account, and the said H. W. Wood shall thereupon accept the drafts or bills of the said company for the amount so appearing due, such bills or drafts, including interest at 5*l.* per cent., to be drawn at not less than twelve months' date: Eleventh, That the said H. W. Wood shall not take down or remove the said manufactory and premises so erected and built as aforesaid, or the machinery in and about the same ; but that such buildings, erections, and machinery, shall be and remain as a security to the said company for all moneys that shall at any time be due or owing to them, either on account of advances incident to the erection of such buildings and machinery, or for advances made upon manufactured fuel, if any, or for moneys that shall be due in respect of coals supplied, or any other account whatever under and by virtue of this agree- *912] ment: provided always, nevertheless, that, upon *the said H. W. Wood paying or securing any balance that may at any time during

the continuance, or at the determination, of this agreement, be due from the said H. W. Wood to the said company, the said company shall, if required so to do by the said H. W. Wood, take at a valuation, to be made by a referee or referees so to be chosen as aforesaid, the machinery and fixtures of and upon the said manufactory and premises: Twelfth, That, in the lease to be granted to the said H. W. Wood, a covenant for title shall be inserted on the part of the said company, and covenants shall be inserted on the part of the said H. W. Wood, that the premises so to be leased shall not be used for any other purpose or purposes than that of the manufacture of patent-fuel, and that the said H. W. Wood shall not underlet or assign the said premises, or any part thereof, without the consent of the said company, such consent not being unreasonably withheld: Thirteenth, That, in case the said H. W. Wood shall cease to use and consume the small coal of the said company, by reason of their inability to supply him therewith *as hereinbefore mentioned and agreed*, or otherwise howsoever, and the said H. W. Wood shall continue in the occupation of the said premises, the said H. W. Wood shall pay to the said company a rent or sum of 100*l. per annum*, during the then continuance of this agreement, such rent to commence within six months after the said H. W. Wood shall so cease to use and consume the small coal of the said company as aforesaid: Fourteenth, That the said agreement, to be determinable as aforesaid, shall continue for the term of twelve years from the date hereof, and that, at the expiration of the said term of twelve years from the date hereof, if the said H. W. Wood shall so elect and determine, and of such election or determination shall give one month's notice in writing to the said company, but not otherwise, the said company shall pay *or allow to the said H. W. Wood the then value of the [918 machinery and fixtures, such value to be ascertained by arbitration in the manner hereinafter mentioned: provided also, and it is hereby agreed and declared between and by the said parties hereto, that, if at any time during the continuance of this agreement, any disputes or differences shall arise between the said parties, respecting any clause, matter, or thing herein contained, or relating to the premises, or otherwise arising out of this agreement, the same shall be referred to the arbitration of two indifferent persons, one to be chosen by each party; and the decision or award in writing of such arbitrators, in case they shall agree upon the matters in dispute, or of their umpire,—whom they are hereby authorized to appoint, in case they shall differ,—shall be binding and conclusive on the said parties hereto; provided such award, whether by the arbitrators or their umpire, shall be in writing, and be delivered to the parties within one calendar month after the matters therein contained shall have become the subject of reference to arbitration: Provided that the said piece or parcel of land, manufactory, and premises, shall not be a security for a larger amount than 5000*l.* In witness," &c.: *prout patet*, &c.: Averment, that, after the making of

the said deed, and during the said term of twelve years, which had not yet expired, and in the week next after the making of the said deed, which expired, to wit, on the 28th of July, 1847, and in divers, to wit, twenty-five successive weeks then next following, and which elapsed before the commencement of this suit, the plaintiff required for consumption and use, for him, for the purposes of his said manufactory, in each of those weeks, a large quantity, not exceeding 500 tons, and amounting, to wit, to 500 tons, of the said small coal so to be supplied *914] to him weekly by the defendants as aforesaid, and the *plaintiffs, at reasonable times before the expiration of each of those weeks, to wit, on the 22d of July, 1847, and on divers days and times afterwards, gave the defendants notice of the premises, and required of them to supply him, in each of those weeks respectively with, and deliver to him, at the place in the said deed in that behalf provided for and agreed on as aforesaid, to wit, over the weighbridge on the said premises of the plaintiff at Port Talbot aforesaid, and in the manner named in the said deed, and according to the defendants' said covenant in the said deed, the said quantities of the said coal so required by him as aforesaid, not exceeding 500 tons *per* week, and so to be by the defendants supplied as aforesaid: that the plaintiff, during each of those weeks, and during all the time aforesaid, was ready and willing to buy and purchase of the defendants those quantities, and accept and receive and pay for the same respectively, at the place, in the manner, and upon the terms in and by the said deed in that behalf covenanted and agreed upon as aforesaid,—and whereof the defendants during all the times aforesaid had notice: That, although the defendants, during each of the said several weeks, could, and might, and ought, according to the said deed and their said agreement in that behalf, to have supplied the plaintiff with the said quantities of the said coal which the plaintiff so required as aforesaid; and although the defendants were not unable, from any substantial cause, so to supply the same, or any part thereof, and did not at any time during the time aforesaid, give to the plaintiff any notice of their inability to supply the same; and although the plaintiff had performed the said deed in all things therein contained on his part to be performed; yet that the defendants did not nor would, in or during the said twenty-six weeks, or at any other time, supply the plaintiff with the said quantities of the said small *915] *coal so to be supplied to him by the defendants as aforesaid, and so required by the plaintiff as aforesaid, not exceeding 500 tons *per* week, or any part thereof, contrary to the said deed and the defendants' said covenant in that behalf: and, that, after the making of the said deed, and before the commencement of this suit, to wit, on the 22d of July, 1847, and on divers days and times afterwards, the defendants did, under and by virtue of the said stipulations and covenants in that behalf contained in the said deed, supply the plaintiff, at his request, with, and deliver to him, divers large quantities, to wit, 2019 tons of coal, as and

for the said small coal so to be by them supplied for consumption and use by him for the purposes of his said manufacture, and at the times of the delivery thereof, divers portions thereof, amounting in the whole, to wit, to 400 tons, would not, on being passed over a screen of longitudinal bars not less than half an inch apart, pass through such screen, and the same were rubble coal within the true intent and meaning of the said deed, and the plaintiff did afterwards, and within fourteen days after the days and times respectively when the said quantities of coal respectively were so supplied and delivered as aforesaid, to wit, on the 1st of August, 1847, and on divers, to wit, twenty-nine days and times afterwards, and before the commencement of this suit, give, in the whole, divers, to wit, thirty notices in writing to the defendants, and did require of them thereby, to remove and take back divers large quantities in the said notices respectively mentioned, amounting, to wit, to the whole of the said quantities of rubble coal, and to replace and supply to the plaintiff, in lieu and place of the said quantities of rubble coal, free of cost and expense to him, an equal quantity of the said small coal so by the said deed agreed to be supplied and delivered by the defendants to the plaintiff as *afore- [916 said, according to the said deed, within fourteen days next after each of the said notices respectively were so given as aforesaid; and in each of the said notices the plaintiff specified, as nearly as practicable, the quantity of the said rubble coal so required to be removed and taken back: That, although fourteen days after each of the said notices so given as aforesaid, had elapsed before the commencement of this suit; and although the defendants did afterwards, to wit, on the day and year last aforesaid, and on the said several days and times last aforesaid, remove and take back the said quantities of the said rubble coal so required to be removed and taken back as aforesaid; and although the defendants, during those fourteen days after each of the said notices so given as aforesaid, could and might and ought, according to the said deed, and their said agreement in that behalf, have replaced and supplied the plaintiff, in lieu and place of the said quantities of rubble coal, an equal quantity of the small coal so by the said deed agreed to be supplied and delivered by the defendants to the plaintiff aforesaid, according to the said deed; and although the defendants were not unable from any substantial cause so to supply and deliver the same, or any part thereof, and did not at any time during the time aforesaid give the plaintiff any notice of their inability to supply or deliver the same: Yet the defendants did not nor would within the said space of fourteen days after each of the said notices was so given by the plaintiff as aforesaid, or at any other time, replace or supply to the plaintiff in lieu and place of the said quantities of rubble coal, an equal, or any, quantity of the said small coal so by the said deed agreed to be supplied and delivered by the defendants to the plaintiff as aforesaid, according to the said deed, but wholly neglected and refused so to do, and wholly neglected and refused so to

*917] do for and during divers, to wit, 150 days after the *expiration of fourteen days after each of the said notices was so given as aforesaid, and amounting in the whole, to wit, to 4500 days, which elapsed before the commencement of this suit; and that thereupon and thereby the defendants afterwards, and before the commencement of this suit, to wit, on the 24th day of January, 1848, became and were liable to pay, and indebted to the plaintiff in, a large sum of money, amounting, to wit, to 9000*l.*, being at and after the rate of 2*l.* for each and every of the said days which the defendants so neglected and refused to replace the said rubble coal with the said small coal as aforesaid: yet that the defendants, although often requested by the plaintiff so to do, had not yet paid to him the said sum of 9000*l.*, or any part thereof, and the same remained wholly due and unpaid to the plaintiff; and, that, by means of the said several premises, the plaintiff had been, for and during all the time aforesaid, greatly impeded in, and hindered and prevented from, carrying on the said manufacture of patent-fuel, and hindered and prevented from manufacturing divers, to wit, 30,000 tons of the said patent-fuel, and thereby had lost and been deprived of divers great gains and profits amounting, to wit, to 10,000*l.*, which he might, and otherwise would, have derived and acquired therefrom, and from the sale and disposal of such patent-fuel when manufactured; and thereby the said factory, works, and buildings and premises, and divers large quantities of machinery and chattels which the plaintiff caused and procured to be erected and set up and maintained therein for the purpose of carrying on the said manufacture, became and were during all the time aforesaid, and still remained, unproductive, and of little or no use or value to the plaintiff; and the plaintiff had been hindered and prevented, during the time aforesaid, from *918] having the use thereof and using the same; and the *plaintiff had lost and been deprived of the use of divers large sums of money, amounting, to wit, to 10,000*l.*, which he invested and kept for the purpose of carrying on the said manufacture, and in erecting, procuring, maintaining, and keeping the said factory, works, buildings, premises, machinery, and chattels; and the plaintiff had been and was, by means of the premises, otherwise much damnified, &c.

The defendants demurred specially to this breach, assigning for cause,—that it does not appear in and by the said breach, or in any other part of the declaration, that the defendants ever bound themselves by any covenant, either express or implied, to furnish to the plaintiff 500 tons, or any quantity of coal weekly, during the said period of twelve years mentioned in the said deed in the declaration mentioned, or during any portion of the said term; nor does it appear in and by the declaration, that, even presuming the allegations in the said breach to be correct, that the plaintiff hath any cause of action whatever against them, the defendants, for their refusing or neglecting to supply him with the quantities of coal in the said breach mentioned.

There was also a second breach, as follows:—That, after the making of the said deed, and before the commencement of this suit, to wit, on the 22d of July, 1847, and on divers days and times afterwards, the defendants did, under and by virtue of the said stipulations and covenants in that behalf contained in the said deed, supply the plaintiff, at his request, with, and deliver to him, divers large quantities, to wit, 2019 tons of coal, as and for the said small coal so to be by them supplied for consumption and used by him for the purposes of his said manufacture; that, at the times of the delivery thereof, divers portions thereof, amounting in the whole, to wit, to 400 tons, would not, on being *passed over a screen of longitudinal bars not less than half an inch apart, pass [*919 through such screen, and the same were rubble coal within the true intent and meaning of the said deed; that the plaintiff did afterwards, and within fourteen days after the days and times respectively when the said quantities of coal respectively were so supplied and delivered as aforesaid, to wit, on the 1st of August, 1847, and on divers, to wit, twenty-nine days and times afterwards, and before the commencement of this suit, give, in the whole, divers, to wit, thirty notices in writing to the defendants, and did require of them thereby to remove and take back divers large quantities in the said notices respectively mentioned, amounting, to wit, to the whole of the said quantities of rubble, and to replace and supply to the plaintiff, in lieu and place of the said quantities of rubble coal, free of cost and expense to him, an equal quantity of the said small coal so by the said deed agreed to be supplied and delivered by the defendants to the plaintiff as aforesaid according to the said deed, within fourteen days next after each of the said notices respectively were so given as aforesaid; and in each of the said notices the plaintiff specified as nearly as practicable the quantity of the said rubble coal so required to be removed and taken back: that, although fourteen days after each of the said notices so given as aforesaid had elapsed before the commencement of this suit; and although the defendants did, afterwards, to wit, on the day and year last aforesaid, and on the said several days and times last aforesaid, remove and take back the said quantities of the said rubble coal so required to be removed and taken back as aforesaid; and although the defendants, during those fourteen days after each of the said notices so given as aforesaid, could and might and ought, according to the said deed and their said agreement in that behalf, to have replaced and supplied to the *plaintiff, in lieu and place of the said quantities of rubble coal, an equal quantity of the said [*920 small coal so by the said deed agreed to be supplied and delivered by the defendants to the plaintiff as aforesaid according to the said deed; and although the defendants were not unable, from any substantial cause, so to supply and deliver the same, or any part thereof, and did not at any time during the time aforesaid give the plaintiff any notice of their inability to supply or deliver the same; yet the defendants did not nor

would, within the said space of fourteen days after each of the said notices was so given by the plaintiff as aforesaid, or at any other time, replace or supply to the plaintiff, in lieu and place of the said quantities of rubble coal, an equal or any quantity of the said small coal so by the said deed agreed to be supplied and delivered by the defendants to the plaintiff as aforesaid, according to the said deed, but wholly neglected and refused so to do, and wholly neglected and refused so to do for divers, to wit, one hundred and fifty days after the expiration of fourteen days after each of the said notices was so given as aforesaid, and amounting in the whole, to wit, to 4500 days, which elapsed before the commencement of this suit; and that thereupon and thereby the defendants, afterwards, and before the commencement of this suit, to wit, on the 24th of January, 1848, became and were liable to pay and indebted to the plaintiff in a large sum of money, amounting, to wit, to 9000*l.*, being at and after the rate of 2*l.* for each and every of the said days which the defendants so neglected and refused to replace the said rubble coal with the said small coal as aforesaid; yet that the defendants, although often requested by the plaintiff so to do, had not yet paid to him the said sum of 9000*l.* or any part thereof, and the same remained wholly due and unpaid to the plaintiff.

*921] To this breach the defendants pleaded,—first, that *they did not, under and by virtue of the said stipulations and covenants in that behalf contained in the said deed, supply the plaintiff with, or deliver to him, the said coal in the said breach in that behalf mentioned, as and for the said small coal so to be by them supplied for consumption and use by the plaintiff for the purposes of his said manufacture, in manner and form, &c.;—secondly, that the said portions of coal in the said second breach in that behalf mentioned, would, on being passed over a screen of longitudinal bars not less than half an inch apart, pass through such screen, and that the same were not, nor was any part thereof, rubble coal within the true intent and meaning of the said deed;—thirdly, that the plaintiff did not give the said respective notices in the said second breach, or any or either of them, in that behalf mentioned, to remove and take back the said quantities of rubble coal in the second breach in that behalf mentioned, and to replace and supply to the plaintiff, in lieu and place thereof, the said small coal in that behalf mentioned, in manner and form, &c.;—fourthly, that they, the defendants, were unable, from a substantial cause, to supply or deliver the said small coal, or any part thereof, in the said second breach in that behalf mentioned;—fifthly, that they did, within the space of fourteen days after each of the said notices was so respectively given by the plaintiff, replace and supply to the plaintiff, in lieu and place of the said respective quantities of rubble coal in the said second breach in that behalf mentioned, an equal quantity of the said small coal so by the said deed agreed to be supplied and delivered by the

defendants to the plaintiff as aforesaid, according to the said deed and the said covenant of the defendants in that behalf.

Upon each of these pleas issue was joined.

By an order of nisi prius made at the Gloucester spring assizes, 1848, it was ordered, amongst other *things, that the jury should find [*922 a verdict for the plaintiff, for the damages in the declaration, costs 40s., subject to the award of a barrister, to whom the cause and all matters in difference between the said parties were referred, to raise on his award such questions of law for the opinion of the court as either of the parties might call on him to do, and to assess the damages contingently upon the demurrer, and upon the views which the court might eventually take of the questions of law; with power to order the determination of the contract, and the terms upon which such determination should take place,—the demurrer to be argued at the same time, or to be taken as part of the award, so as to be heard along with the other questions of law.

By rule of court, it was afterwards,—on the 11th of May, 1848,—ordered “that the arbitrator should be at liberty to make and publish two several awards, at different times, of and concerning the different matters referred to him, and in and by the first of his said awards to raise such points of law for the opinion of the court as either of the parties should require him to do, and to assess the damages contingently upon the demurrer depending in the cause, and upon the views which the court might take of the questions of law so to be submitted to them as aforesaid; and that, after the judgment of the court should have been given upon the demurrer, and also upon the questions of law to be submitted to the court as aforesaid, the arbitrator should be at liberty to make and publish his second award of and concerning the other matters so as aforesaid referred to him.”

At the request of the parties, the arbitrator accordingly stated the following case for the opinion of the court:—

This was an action of covenant brought by H. W. Wood against the Governor and Company of the Copper *Miners in England, to recover damages for the breach of certain covenants contained in [*923 a deed bearing date 21st of July, 1847, made between the defendants of the one part, and the plaintiff of the other. Before and at the time of the execution of the deed, the plaintiff had been and was the occupier of certain buildings which had been erected on the land of the defendants for the purpose of manufacturing a certain composition made of small coal and pitch, called “Bell’s Patent Fuel,” and was carrying on the manufacture of such patent-fuel therein at the time of the execution of such deed. The defendants were the owners of certain coal-mines in the neighbourhood.

On the 21st of July, 1847,—the day of the date of the agreement,—the defendants delivered to the plaintiff, over the weighbridge on the plaintiff’s premises at Port Talbot, certain quantities of coal of the

description mentioned in the deed as small coal unscreened; and thenceforth continued, from time to time, till the commencement of the action, to deliver divers quantities of such coal to the plaintiff in the manner aforesaid, amounting in the whole to 3082 tons in weight. But the defendants failed to deliver to the plaintiff the quantity of 500 tons *per* week, notwithstanding they had received notice from the plaintiff that he required the full quantity of 500 tons to be sent down weekly, and notwithstanding the defendants were able to supply that quantity weekly.

Of the coals so supplied by the defendants to the plaintiff, 346 tons were coals which could not, on being passed over a screen of longitudinal bars of not less than half an inch apart, pass through such screen. These last-mentioned coals the plaintiff rejected as rubble coal, and from time to time gave the defendants certain notices in writing specifying, as nearly as practicable, the quantity of rubble coal on the plaintiff's *924] premises, *and requiring the defendants to remove the same according to the agreement. The first of such notices was given by the plaintiff on the 16th of August, 1847, and by it the defendants were required to remove about 20 tons of rubble coal then lying in the plaintiff's yard, from the plaintiff's premises, according to agreement. On the 26th and the 30th of August, the 6th, 13th, and 28th of September, the 4th, 11th, 18th, and 25th of October, and the 13th and 28th of December in the same year, and on the 4th and 13th of January, 1848, the plaintiff also served the defendants with similar notices in writing, specifying as nearly as practicable the quantity of coals deemed by him to be rubble coal, and requiring the defendants to remove the same.

The defendants did, in fact, subsequently to every such notice, and within fourteen days after the receipt thereof, remove the rubble coal to which such notice applied. The defendants also could have supplied the plaintiff with an equal quantity of small coal, in the place of the rubble coal removed, and were not unable, from any substantial cause, to supply or deliver the said small coal. In fact, the defendants did, subsequently to, and within fourteen days after the receipt of, every such notice, deliver to the plaintiff, at the place and in the manner mentioned in the deed, small coal unscreened exceeding in quantity the quantity of rubble coal removed by them in pursuance of such notice: but the total quantity of coals supplied weekly by the defendants to the plaintiff, fell short of the quantity of 500 tons *per* week, although the defendants might and could have supplied the plaintiff with that quantity weekly. There was no act done by the defendants on the first delivery of coals next after every such notice, or at any other time previous to the commencement of the action, to indicate that such delivery was for the purpose of *925] replacing the rubble coal removed by them; nor was *there any direct substitution of an equal quantity of small coal in lieu and in place of the rubble coal removed.

The plaintiff claimed liquidated damages, under the second breach, in

respect of every default on the part of the defendants to replace the rubble by small coal, after notice from the plaintiff to remove the rubble; such damages to be calculated at the rate of 2*l. per diem* for every day that had elapsed from the expiration of every such notice of default, up to the time of the commencement of the action. If this were the proper mode of calculating the damages in respect of the second breach, the arbitrator found that they would amount in the whole to 241*l.*

The defendants contended that the plaintiff was not entitled to more than nominal damages in respect of the second breach. But that, if the plaintiff was entitled to more than nominal damages, in that case, the amount of such damages ought to be assessed in one of the modes following, that is to say, either at the sum of 28*l.*, being 2*l. per diem* for one period of fourteen days,—or else at the sum of 28*l.* in respect of every neglect of the defendants to replace the rubble coal after notice, by which mode of calculation the damages amounted in the whole to 392*l.*,—or else at the sum of 2*l. per diem* for every day from the expiration of the first notice to the commencement of the action, according to which last mode of calculation the damages amounted in the whole to 296*l.*

The questions for the opinion of the court, were,—first, whether the first breach was sufficient in law. If the court should be of opinion that it was, then the arbitrator assessed the damages sustained by the plaintiff by reason of such breach, at 227*l.* If not, then judgment was to be entered for the defendants on that breach.

*Secondly, whether the defendants, by the delivery to the plaintiff of the small coal in the manner stated in the case, did [926 supply to the plaintiff, in lieu and in place of the rubble coal returned, an equal quantity of coal agreed to be delivered by the deed. If the court should be of opinion that the defendants did, under the circumstances stated in the case, supply to the plaintiff, in lieu and in place of the rubble coal returned, an equal quantity of the coal agreed to be delivered by the deed, then a verdict was to be entered for the defendants on the issue joined on the fifth plea; otherwise, the verdict for the plaintiff on that plea was to stand.

Thirdly, if the court should be of opinion that the plaintiff was entitled to a verdict on the issue joined on the fifth plea, then the opinion of the court was requested, whether the second breach was sufficient in law. And, if the court should be of opinion that the second breach was not sufficient in law, then judgment for the plaintiff on such breach was to be arrested.

Fourthly, if the court should be of opinion that the second breach was sufficient in law, then the opinion of the court was requested whether the plaintiff was entitled to more than nominal damages in respect of the second breach. And, if the court should be of opinion that the plaintiff was entitled to more than nominal damages in respect

of the second breach, whether such damages were properly calculated in the mode contended for by the plaintiff; if not, whether they were to be calculated in any, and, if so, in which, of the modes contended for by the defendants,—if not, the court were asked to direct in what way the damages were to be calculated: and a verdict to be entered for the plaintiff for the amount, when ascertained.

And the arbitrator directed that the verdict entered for the plaintiff on the first, second, third, and fourth issues joined between the parties, *927] should stand; and *that the verdict on the fifth issue joined between the parties be entered for the plaintiff or the defendant, as the court might, upon consideration, direct; and, if for the plaintiff, then with such damages as the court might direct; and that judgment should be finally entered for such party, and in such form, as the court, upon consideration of the premises, should deem meet; or, if the court should think right that judgment for the plaintiff be arrested, then that judgment for the plaintiff be arrested accordingly.

The pleadings in the cause, and the deed of the 21st of July, 1847, were to form part of the case.

The case and demurrer now came on for argument.

Alexander, in support of the demurrer.(a) The deed upon which the *928] question in this case arises, is not framed *in very intelligible terms. The first stipulation contained therein relates to the grant of a lease of certain land by the defendants to the plaintiff, at a peppercorn rent. Then come certain provisions for advances of money by the defendants to enable the plaintiff to carry on the manufacture of

(a) The points marked for argument, on the part of the defendants, were—

“First, that, although the plaintiff was bound by the deed set forth in the declaration (subject to the exceptions therein contained) not to use or consume at the said factory any other coal than that which should be bought and purchased of the defendants, it was nevertheless entirely optional with the defendants whether they would supply such coal or not; and that the declaration does not disclose any covenant on their part, either express or implied, to furnish the plaintiff with any quantity of coal during the said period of twelve years, or during any portion of that time:

“Secondly, that, although the stipulation as to notice, contained in the fifth article of the said deed, may possibly show that the plaintiff was not at liberty, in the absence of any such notice, to consume on his said premises small coal purchased from any person or persons other than the defendants, no covenant can be implied from it that the defendants should, until such notice should be given, supply the plaintiff with the said quantity of 500 tons weekly; and that no covenant in the alternative, either to supply the said quantity, or to give the said notice of inability, can be implied from any part of the said deed:

“Thirdly, that it appears in and by the declaration, and under the circumstances therein set forth, that the defendants were not bound to give to the plaintiff the notice required by the fifth article:

“Fourthly,—the defendants will also contend, if necessary, that, upon the true construction of the portion of the said deed to which the first breach applies, the plaintiff was always at liberty, even without such notice as is mentioned in the fifth article, to obtain from other sources any quantity or excess of small coal required for the purposes of his factory, immediately on the failure of the defendants (whether able to supply the said coal or not) to supply him with any, or a sufficient quantity of the said small coal; and that the object of the said stipulation for notice was merely, that, in the event of the actual inability of the defendants to supply any portion of the said quantity of 500 tons per week, the covenant of the plaintiff to use no other coal than that purchased of the defendants, should, as to such portion, at the expiration of six months from the time of giving such notice, thenceforth entirely cease.”

patent-fuel. The most material stipulation is the fourth, which provides that all the coals used by the plaintiff in his manufacture during the term shall be bought of the company, provided that they *can and shall* supply him with the quantity required by him, or to such extent as they *can* supply, and restrains the plaintiff from using any other coal, except in the event of his requiring more than the company *can and shall* supply him with. This clearly gives an option to the defendants to supply the coal or not: the plaintiff binds himself to consume their coal to the extent to which the defendants are able and willing to supply it. On the part of the plaintiff, reliance will, in all probability, be placed on the fifth stipulation—that the company shall not be compelled to supply more than 500 tons *per week*, and that, in case they shall from some substantial cause be unable to supply coal to the extent agreed upon, they shall give the plaintiff notice of their inability, and in that case he shall be at liberty **to obtain a supply elsewhere*. It will be con- [*929 tended that this amounts to a *contract* on the part of the company to supply 500 tons *per week* at the least. But it is equally clear that the express terms of this fifth stipulation, will not sustain the first breach. In *Williamson v. Taylor*, 5 Q. B. 175, 1 D. & M. 389, by agreement between the defendant and plaintiff, the defendant, being the owner of a colliery, retained and hired the plaintiff to hew, work, &c., at the colliery, for wages at certain rates in proportion to the work done, payable once a fortnight; and the plaintiff agreed to continue the defendant's servant during all times the pit should be laid off work, and, when required (except when prevented by unavoidable cause), to do a full day's work on every working day: and it was held that the defendant was not obliged by this contract to employ the plaintiff at reasonable times for a reasonable number of working days during the term. So, in *Aspdin v. Austin*, 5 Q. B. 671, 1 D. & M. 515, by agreement between the plaintiff and defendant, the plaintiff agreed to manufacture for the defendant, cement of a certain quality; and the defendant, on condition of the plaintiff's performing such engagement, promised to pay him 4*l.* weekly during the two years following the date of the agreement, and 5*l.* weekly during the year next following, and also to receive him into partnership, as a manufacturer of cement, at the expiration of three years; and the plaintiff engaged to instruct the defendant in the art of manufacturing cement: each party bound himself, in a penal sum, to fulfil the agreement: the defendant afterwards covenanted by deed for the performance of the agreement on his part: and it was held, that the stipulations in the agreement did not raise **an implied covenant* that the de- [*930 fendant should employ the plaintiff in the business during three or two years, though the defendant was bound, by the express words, to pay the plaintiff the stipulated wages during those periods respectively, if the plaintiff performed, or was ready to perform, the condition precedent on his part. These cases tend to show that the court will construe

agreements according to the words the parties have used, and will not be beguiled by any arguments of suggested hardship. *Dunn v. Sayles*, 5 Q. B. 685, 1 D. & M. 519, is an authority to the same effect. There, a declaration in covenant stated, that, by deed between the defendant, J. D., and the plaintiff, the plaintiff covenanted that J. D. should for five years from the date serve the defendant in the art of a surgeon-dentist, and attend for nine hours each day; and the defendant, in consideration of the services to be done by J. D., covenanted with the plaintiff, that he, the defendant, would during the five years (in case J. D. should faithfully perform his part of the agreement, particularly as to the nine hours, but not otherwise), pay J. D. 35s. *per week* for the first year, 2l. *per week* for the second and third, and 2l. 2s. *per week* for the fourth and fifth: that J. D. was in the service for some time after the making of the deed, till dismissed, and during all that time faithfully performed service, &c., and was willing, and tendered to perform, &c., to the end of the five years; but that the defendant, during the term, refused to permit J. D. to remain in his service, and dismissed him: and it was held, on motion in arrest of judgment, that the declaration did not show any covenant corresponding to the breach. Lord DENMAN, in delivering the judgment of the court in *Aspdin v. Austin*, says (5 Q. B. 684): *931] "Where parties have entered into *written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications: the presumption is, that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued, during the three years, and yet neither party might have been willing to bind themselves to that effect: and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as upon a full consideration the court may deem fitting for completing the intentions of the parties, but which they, either purposely or unintentionally, have omitted." [MAULE, J., referred to *Hartley v. Cummings*, 5 Man. Gr. & S. 247. CRESSWELL, J. Here, the contest is, not as to the necessity for mutuality, but whether mutuality exists.] There is no covenant, express or implied, on the part of the defendants, to supply the coals.

The arbitrator finds, in effect, that the defendants *did* remove the rubble coal, and did, within the stipulated time, deliver an equal quantity of small coal: it was not necessary that there should be any express appropriation of the coal so supplied. The penalty, therefore, never attached.

The arbitrator should have stated in his award what the damages actually sustained, were. The plaintiff has suffered only one part of

the mischief for which the penalty was imposed: *Astley v. Weldon*, 2 B. & P. 346, *Kemble v. Farren*, 6 Bing. 141, 3 M. & P. 425.

**Talfourd, Serjt.* (with whom was *Keating*), *contra*. (a) Where- [932
ever it can be collected from the whole instrument that the parties mutually contract to do certain things, a covenant, though not expressed, will be implied. In *Comyns's Digest*, *Covenant* (C. 4.), (b) it is said that "Some words import and make a covenant in law, though there be not any express covenant; as, if a man by deed demise land for years, and the lessee is ousted, covenant lies upon the word *demisi*." It is not necessary that the word "covenant" should expressly appear in a deed, in order to create a covenant: *Saltoun v. Lady Houstoun*, 1 Bing. 433, 8 J. B. Moore, 546. There, by indenture between S. F. senior, of the first part, S. F. junior, of the second part, and J. H. H. of the third part, it was agreed that S. F. senior should retire from the business, and S. F. junior and J. H. H. become partners; that the capital employed should be 36,000*l.*,—24,000*l.* of *which S. F. [933
senior should advance for S. F. junior, and 12,000*l.* was to be advanced by J. H. H. The deed then proceeded,—“And whereas, an account of all the debts of S. F. senior in his business of a merchant has been this day taken, and the balance in his favour amounts to 38,033*l.*; and *whereas, it has been agreed by and between S. F. senior, S. F. junior, and J. H. H., that the whole of the debts and credits of S. F. senior shall be received and paid by S. F. junior and J. H. H., and that the balance of 38,033*l.* shall be accounted for, and paid, by them in manner hereinafter mentioned, and S. F. senior hath assigned the debts and credits to them,—this indenture witnesseth that it is agreed, that, in consideration of 12,000*l.* paid to S. F. senior by J. H. H., and for raising 24,000*l.*, as S. F. junior's share of the capital, the sum of 36,000*l.*, part of the 38,033*l.*, is to be retained by S. F. junior and J. H. H., and the remaining 2033*l.* paid to S. F. senior by instalments, at six, twelve, and eighteen months; and, if any of the debts shall prove bad, the loss shall be borne by S. F. junior and J. H. H. And it was held that this deed amounted to a covenant by S. F. junior and J. H. H.*

(a) The points marked for argument on the part of the plaintiff, on the demurrer, were,—“That the deed shows a covenant by the defendants to furnish to the plaintiff 500 tons of coal weekly, during the term of twelve years; and that the declaration sufficiently shows a cause of action against the defendants for their not supplying him with the quantities of coal mentioned in the breach.”

Those stated for argument on the plaintiff's part, on the award, were,—“That the first breach in the declaration is sufficient in law, for the reasons assigned above, and that he is entitled to judgment thereon for the damages found by the arbitrator; and that the second breach in the declaration is well assigned, and at all events sufficient after verdict; and that the verdict should be entered for the plaintiff on the fifth issue, upon the grounds stated in the award, and for damages to the amount as stated in the award to have been claimed by him before the arbitrator.”

(b) Citing 1 Roll. Abr., 519, l. 46 (translated 6 Vin. Abr. 385, title *Covenant* (F.), pl. 1), which refers to H. 48 E. 3, fo. 2, pl. 4, where an opinion of *PERSAY, J.*, to the contrary is overruled,—not without an intimation of surprise that such an opinion should have been entertained by so wise a man; 4 Co. Rep. 80, b; *Dyer*, 257, a; 2 Lev. 104; *Cro. Eliz.* 674; *Cro. Jac.* 73.

to pay the debts due from S. F. senior in his business at the date of the indenture. Lord GIFFORD, C. J., there says (8 J. B. Moore, 571): "It is sufficient if it appears from the whole of the instrument, or can in terms be collected, that there is an intention of the parties that such a covenant shall exist; and, if it were necessary to refer to authorities in support of so clear a position, I need only mention Stevenson's case, 1 Leon. 324, where, in an action of debt on bond, the condition was, that, 'whereas the plaintiff had covenanted with the defendant that it should *934] be lawful for the defendant to cut down wood for fire-bote and *hedge-bote, without making any waste, or cutting more than was necessary;' and the breach assigned, was, that the defendant had committed waste in felling wood, &c., and the condition of the bond was, to perform all covenants and agreements; and exception was taken, because the condition ought only to extend to covenants to be performed on the part of the lessee;—yet the exception was not allowed, as it appeared from the whole of the instrument that it was the *agreement* of the lessee, although it was the covenant of the lessor." So, in *Sampson v. Easterby*, 9 B. & C. 505, 4 M. & R. 422,(a) where a lease of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor and the owners of the other two-thirds, for pulling down an old smelting-mill, and building another of larger dimensions; and the lease contained a covenant to keep such new mill in repair, and so leave it at the expiration of the term, but did not contain an express covenant to *build it*: it was held that such covenant was to be implied. And in *Connoch v. Jones*, 18 Law Journ., N. S., Exch. 204, where, in a lease, S. C. covenanted with E. J. that he would, during the term, at his own costs and charges, repair the windows of the messuage, and also the hedges, ditches, mounds, and fences; *the said farm-house and buildings being previously put and kept in repair by the said E. J.*,—it was held that these latter words raised an absolute covenant on the part of E. J. to put the farm-house and buildings in repair; and that,(b) in order constitute a covenant, no technical words are necessary; it is sufficient if you can collect, from *the terms of the *935] instrument, that the thing is to be done. So, here, it was evidently the intention of the parties that the covenants should be mutual,—the plaintiff to take the coal, and the defendants to supply it, to the extent of 500 tons *per* week, provided they were of ability so to do. There is no necessity to resort to an implied covenant. The words amount to a covenant to buy, as well as to sell.

Upon the second breach, two questions arise,—first, how the verdict is to be entered on the fifth issue, whether for the plaintiff or for the defendants,—secondly, if for the plaintiff, upon what principle the

(a) Affirmed, on error, by the Exchequer Chamber, *Easterby v. Sampson*, 6 Bingh. 644, 4 M. & P. 601.

(b) Per PARKE, B., citing the *Duke of St. Albans v. Ellis*, 16 East, 352.

damages are to be estimated. The finding of the arbitrator shows that the defendants failed to perform their covenant. [MAULE, J. Do the facts found enable the arbitrator to ascertain the damages?] It is submitted that they do, and that there is nothing to prevent the plaintiff from recovering the amount as stipulated. [WILDE, C. J. In cases of payment, the party paying may appropriate the payment: if he do not, the receiver may.(a) Apply that to this case.]

Alexander, in reply, insisted that the quantity of supply was altogether optional on the part of the defendants, and that, upon the finding of the arbitrator, the question of damages upon the second breach never could arise.

[It was ultimately agreed that the jury should be discharged as to the fifth issue.]

WILDE, C. J. I am of opinion that the plaintiff is entitled to judgment on the demurrer, and that the deed declared on amounts to a covenant on the part of the *defendants to supply small coal to a plaintiff, for the purpose of his trade, to the extent of 500 [*936 tons *per week*. The form of the deed does not show clearly in one part a covenant by the plaintiff, and in another part a covenant by the defendants: but it is an instrument under seal, and the intention of the parties is sufficiently apparent from the whole language of it: it shows, with reasonable certainty, what it is that was intended to be contracted for by each party. It begins with reciting that the defendants had agreed to grant to the plaintiff a lease of certain land and premises, and to enter into other arrangements for the supply of coal for the plaintiff's manufactory, on the terms and conditions after mentioned. It then goes on to state that it is thereby agreed, by and between the said parties, in manner following. What is agreed? Why, amongst other things, that all the coals consumed and used by the plaintiff for the purpose of his manufacture during the term, shall be bought of the defendants provided the defendants *can and shall* supply him with the quantity that shall from time to time be required by him, or to such extent as the defendants *can* supply; and that the plaintiff shall use and consume no other coal at his factory during the term than that which is bought of the defendants, except in the event of his requiring more small coal than the defendants *can and shall* supply him with. There must be two parties to a transaction, to made it enure as a purchase. When two persons mutually agree that one of them shall purchase goods of the other; that amounts to a contract that the one shall sell and that the other shall buy. The words "provided the defendants *can and shall* supply him with the quantity that shall from time to time be required by him," have not the effect of controlling the previous words. When the plaintiff contracted

(a) *Vide Devaynes v. Noble*, 1 Meriv. 604; *Simson v. Ingham*, 2 B. & C. 65; 3 D. & R. 249 252; Vin. Abr. *Payment* (M).

*937] to purchase from the defendants all the coals which were *to be used by him, it was necessary that he should guard himself against the possibility of their being unable or unwilling to furnish him with the required supply. It was to meet that contingency that these words were introduced. The object the defendants had in view, was, to restrain the plaintiff from using any other coal than that which came from their colliery. Considering this as a contract of purchase on the one hand, and of sale on the other, and looking to its nature and object, viz. the promotion of the manufacture to be carried on by the plaintiff near to the colliery of the defendants,—the contiguity of the place of supply being essential to the plaintiff's success, seeing that carriage would form so large a proportion of the value of the raw material; it appears to me to be plain and free from doubt, upon the words of the fourth stipulation alone, that the defendants did contract to supply the plaintiff with coal to the extent of 500 tons weekly, provided they were of ability so to do. Many of the subsequent stipulations confirm this view of the fourth. The fifth provides that the defendants shall not be *compelled* to supply more than 500 tons *per week*, and that, in case they shall, from some substantial cause, be unable to supply small coal to *the extent agreed upon*, they shall give the plaintiff a certain notice. The thirteenth provides for the case of the plaintiff's ceasing to consume the coal of the defendants, by reason of their inability to supply him therewith "as hereinbefore mentioned and agreed." There is no clause in the deed by which they have so agreed, unless it be the fourth. I therefore think the demurrer cannot be supported: it is founded upon a construction of the deed which its language does not warrant.

COLTMAN, J. I am of the same opinion. This is an agreement between *938] the parties: the words are the *mutual words of each. If the case rested upon the fourth stipulation alone, I must confess I should have doubted whether it could be said that the defendants *covenanted* to supply the plaintiff, to the extent of their ability, with all the coal required by him for the purpose of his manufacture; although, considering the relative position of the parties, it might reasonably be supposed that such was their intention. That clause is certainly open to the construction, that it was only intended that the plaintiff should buy, if the defendants *could* and *did* supply the requisite quantity. All doubt, however, is removed by the fifth stipulation, which clearly shows that the defendants considered themselves bound to supply some coal, and therefore limit their obligation to the supply of 500 tons weekly. I think the case is a perfectly plain one.

MAULE, J. I also am of opinion that the plaintiff is entitled to judgment on this demurrer. This agreement is not in the regular form of a covenant: it was probably, however, more intelligible to the immediate parties in its present shape, than if it had been more formal. I have no difficulty in seeing that their intention was, that the plaintiff

should buy his coal of the defendants, and that they should sell their coal to him. Upon the construction contended for on the part of the defendants, many of the words that are introduced into the instrument are insensible. The words "provided the company *can and shall* supply him with the quantity that shall from time to time be required by him," are relied on as limiting and controlling the previous words. But the word "shall" is evidently used with reference, by anticipation, to what comes afterwards, by way of limitation, in the fifth stipulation. The intention of the parties is sufficient to constitute a covenant, in an instrument under seal, commencing with *the words, "it is agreed [*939 between the said parties, as follows." If it is competent to give the words of the fourth stipulation that sense, the subsequent words of this instrument abundantly show that it is the true sense.

CRESSWELL, J. I am entirely of the same opinion. The words in this deed are the words of both parties. Taking the fourth stipulation alone, the observations of my brother MAULE seem to me to be strong to show that this is a covenant by the defendants to supply the plaintiff with coals as far as they were of ability, to the extent required, subject to the limitation provided by the fifth stipulation.

Judgment for the plaintiff, on demurrer.

DOE, on the several Demises of DANIEL BRAMMALL and THOMAS BLACKBURNE *v.* JAMES COLLINGE. *June 6.*

The perpetual curate of a curacy augmented by the governors of Queen Anne's bounty, with the confirmation of the ordinary and immediate patron, granted a lease for years of unopened mines which had not before been leased; but the patron of the advowson was no party:—Held, that the lease was void at common law, for want of confirmation by such patron paramount; and that it was not set up by the acceptance of rent by the lessor's successor in the curacy,—the only effect of such acceptance of rent being, to create a tenancy from year to year.

THIS was an action of ejectment, brought for the recovery of certain lands situate in the parish of Prestwich-cum-Oldham, in the county of Lancaster.

The declaration contained counts on demises laid on the 1st of May, 1841, and 31st of December, 1846.

*The cause came on for trial at the last summer assizes for the southern division of the county of Lancaster, when a verdict was found for the plaintiff, subject to the opinion of the court on the following case:—

The lands sought to be recovered in this action, are called The Nether Hey Estate, and are situate in the township of Oldham, in the parish of Prestwich-cum-Oldham, in the southern division of the county of Lancaster, and were, prior to the year 1847, in the diocese of Chester. The chapel of Shaw is in the patronage of the rector for the time being of

the parish of Prestwich-cum-Oldham; and, prior to the year 1847, was within the jurisdiction of the Bishop of Chester, as ordinary.

In the year 1718, the chapelry of Shaw was duly augmented by the Governors of Queen Anne's Bounty; by virtue of which, and by force of the statute made in that behalf, it became a perpetual curacy.

By indenture bearing date the 2d of November, 1724, made between the Rev. William Assheton, B. D., then being rector of Prestwich-cum-Oldham, of the first part, the Governors of the Bounty of Queen Anne, of the second part, and John Kippax, clerk, then being the curate of Shaw chapel, of the third part,—after reciting the grant of the governors made in 1718—it was witnessed, that, for the consideration therein mentioned, he the said William Assheton, at the nomination of the said governors, granted, bargained, and sold unto the said John Kippax, and his successors, curates of Shaw chapel aforesaid, All that messuage or tenement, with the appurtenances, commonly called or known by the name of Nether Hey, together with the dwelling-houses and parcels of land therein more particularly described (the same being the premises hereinbefore called The Nether Hey Estate), To hold the said messuages or tenements, lands, and premises, with their appurtenances, unto the *941] said John Kippax, and his successors, curates of Shaw chapel aforesaid, for ever, for a perpetual augmentation of the said chapel.

[A copy of that indenture accompanied the case, and either party was to be at liberty to refer to it, as if set out therein.]

The above indenture was in due manner executed by the Governors of Queen Anne's Bounty, by the said William Assheton, and by the said John Kippax, and was enrolled, within six months in the court of Chancery.

From the time when the estate of Nether Hey was so conveyed as aforesaid, up to the time of the granting the leases hereinafter mentioned, the same has been enjoyed by the curates of the chapelry of Shaw; and, during that time, there have been several incumbents of the rectory of Prestwich-cum-Oldham, and several curates of the chapelry of Shaw. But, at the date of the leases hereinafter mentioned, the Rev. Thomas Blackburne, one of the lessors of the plaintiff, was the incumbent rector of Prestwich-cum-Oldham, and the Rev. James Hordern was the perpetual curate of the chapelry of Shaw.

For more than twenty years prior to the granting of the lease hereinafter next mentioned, and during the curacies of Mr. Hordern and his last two predecessors, one Abraham Clegg occupied the Nether Hey Estate, as yearly tenant, paying an annual rent of 50*l.* to the curate of Shaw for the time being. He paid that rent merely for the occupation of the surface.

During the time that Abraham Clegg occupied as such tenant, he and Abraham Lees bored in the said estate, to search for coal, but were not

successful in finding any; and, prior to the granting of the lease herein-after next mentioned, no coals had been wrought or gotten under the said estate. But, in or about the *year 1833, the defendant com- [*942
menced working the coals.

On the 29th of September, 1830, by an indenture then made between the Rev. James Hordern, therein described, of the one part, and the defendant, therein described, of the other part, it was witnessed, that, for the considerations therein mentioned, he the said James Hordern did demise unto the said James Collinge, his executors, administrators, and assigns, All that messuage or tenement and farm known by the name of Nether Hey, situate as therein described, with the appurtenances; and also all the parcels of land therein described (the same being the premises hereinbefore called The Nether Hey Estate); and also all the mines, veins, beds, and seams of coal and cannel, of all kinds, nature, and quality, lying and being within or under the aforesaid several parcels of land; and also full liberty to and for the said James Collinge, his executors, administrators, and assigns, agents, and servants, to enter into and upon the said lands, from time to time, and at all times during the continuance of the said demise, and to dig, bore, delve, sink, search for, get, and raise the coal, cannel, culm, and slack lying and being in such mines, veins, beds, and seams, and to dig, sink, drive, run, and make any pits, shafts, levels, soughs, trenches, and watercourses in and about the said mines and works; and also to erect, in and upon the said lands, engines, gins, and other machines, smithies, forges, and other buildings, and use all such devices, ways, and means as should be found necessary for draining, raising, and getting, and working the said mines, veins, beds, and seams of coal and cannel; and to place, stack up, and lay such coal, and the earth, rubbish, and soil to be raised out of the pits, upon the said lands; and also to make roads, railroads, pools, reservoirs, canals, and watercourses, in, through, and over the said lands, *and to do and perform all things necessary or expedient for [*943
taking, conveying, carrying away, and disposing of the said coal and cannel,—To have and to hold the said messuage or tenement and farm, and parcels of land, and to have, hold, use, and enjoy the said mines, veins, beds, and seams of coal and cannel, culm, or slack, liberties, privileges, and powers aforesaid, unto the said James Collinge, his executors, administrators, and assigns, from the day of the date thereof, for the term of fifty years thence next ensuing, and fully to be complete and ended, if he the said James Hordern should so long happen to live and continue incumbent of the curacy of Shaw aforesaid; Yielding and paying therefore, yearly, during the first two years of the said term, unto the said James Hordern, his executors, administrators, or assigns, the yearly rent or sum of 150^s., and yielding and paying, from and immediately after the expiration of the first two years of the said term, yearly and every year during the continuance of the said term, unto the

said James Hordern, his executors, administrators, and assigns, the clear annual rent or sum of 200*l.*

[A copy of this indenture also accompanied the case, and either party was in like manner to be at liberty to refer to it.]

After the granting of the last-mentioned lease, the said Abraham Clegg continued to occupy the surface of the said Nether Hey Estate, as tenant to the defendant; and, in or about the year 1832, the defendant opened, and has thence hitherto worked, the mines which lie under that estate; and the same are still in the occupation of the defendant.

By indenture bearing date the 24th of December, 1839, made between the said James Hordern, therein described, of the first part, the Right Rev. Father in God, John Bird, Lord Bishop of Chester, ordinary of *944] the said curacy, of the second part, The Rev. Thomas Blackburne, of Prestwich, in the county of Lancaster, rector and patron of the said curacy, of the third part, and the defendant, as therein described, of the fourth part,—it was witnessed, that, for the consideration therein mentioned, the said James Hordern, according to his estate and interest in the said premises, and so far only as he lawfully could or might, demised and leased, and the said bishop and Thomas Blackburne consented unto and confirmed unto the defendant, all that messuage or tenement and farm known by the name of Nether Hey, with the several parcels of land therein mentioned, being the said premises called The Nether Hey Estate, and then in the occupation of Abraham Clegg, and his undertenants; and all and every the mines, veins, beds, and seams of coal and cannel, of all kinds, nature, and quality, lying and being within or under the aforesaid messuage or tenement, farm, and parcels of land; and also full and free liberty, license, power, and authority, to and for the defendant, his executors, administrators, and assigns, servants, miners, and workmen, from time to time, and at all times thereafter during the continuance of the said demise, to enter in and upon the said lands and premises, or any part of them, and to bore, dig, delve, sink, search for, get, and raise the coal, cannel, culm, and slack lying and being in such mines, beds, and seams, and to dig, sink, drive, run, and make any pits, shafts, levels, soughs, trenches, and watercourses, in and about the said mines and works; and also to set up cottages for workmen, engines, machines, smithies, and forges and other buildings, and use all devices for laying dry, raising, and getting the said coal and cannel, and also the coal and cannel lying and being within or under the lands or grounds belonging to any other person or persons whomsoever, of which the defendant, either solely, or jointly with any person or *945] persons, then was, or of which he the defendant, his executors, administrators, or assigns, either solely or jointly, should or might at any time during the term thereby granted become lessee or proprietor, and to place, stack up, and lay such coal and cannel, and the earth, rubbish, and soil to be raised out of such pits or shafts and mines, upon the

said lands, and to make railways, pools, reservoirs, canals, and water-courses, and to get stone and gravel, and to dig clay, marl, and sand, and to temper, mould, make, and burn such clay, marl, and sand into bricks, at any convenient place or places upon the said lands and grounds, —nevertheless, such stone, gravel, and bricks, only to be used in and about, and for the purposes of, the said works, and for repairing the buildings then in being on the said lands; and also to have like liberty to do and perform all reasonable acts for carrying away the coal, and liberty of full ingress, egress, and regress into, from, and out of the said lands and premises, with or without horses and carriages; to hold to the said James Collinge, his executors, administrators, and assigns, from the date thereof, for the term of twenty-one years from thence next ensuing: Yielding and paying yearly and every year unto the said James Hordern, and his successors, the yearly rent of 250*l*. The indenture also contained, amongst other provisoes and covenants, a proviso for re-entry on non-payment of rent, and a covenant that the defendant would at all times permit the said James Hordern, and his successors, and his or their agents or servants, during the continuance of the demise, to inspect the mines. There was also a proviso that it should be lawful for the defendant to determine the lease at the expiration of the first seven or fourteen years, by giving twelve months' notice. And the said James Hordern did thereby, with the consent and approbation of the said bishop and the said Rev. Thomas Blackburne, for *himself, his heirs and successors, direct and declare that the yearly sum of 50*l*., part of the [946 said yearly rent of 250*l*. thereby reserved, should yearly be paid into the hands of the said Governors of Queen Anne's Bounty, for the purpose of augmenting the curacy of Shaw.

[A copy of this indenture also accompanied the case, and either party was in like manner to be at liberty to refer to it.]

The rent expressed to be reserved by the last-mentioned lease, in respect of the premises mentioned therein,—which are the premises sought to be recovered in this action,—was paid by the defendant to the said James Hordern, from the date thereof, up to and including the 25th of December, 1840.

The Rev. Daniel Brammall, one of the lessors of the plaintiff in this action, was duly nominated by the Rev. Thomas Blackburne, the then patron, to the said curacy, the same being then vacant by the resignation of the said James Hordern, on the 10th of March, 1841. The form of nomination annexed to the case (a) is the form *then used, and is [947 the form commonly used in nominating to the said curacy. And,

a) " To the Right Rev. John Bird, Lord Bishop of Chester.

" I, the Rev. Thomas Blackburne, rector of Prestwich, in the county of Lancaster, clerk, and, in right of the said rectory, true and undoubted patron of the perpetual curacy of Shaw, in the parish of Prestwich aforesaid, and in your lordship's diocese of Chester, vacant by the resignation of James Hordern, the last incumbent there, do nominate to your lordship and the said perpetual curacy, Daniel Brammall, clerk, M. A., humbly requesting that you will be pleased to license the

by deed of license, dated the 12th of March, 1841, under the hand and episcopal seal of John Bird, then Bishop of Chester, the ordinary, the said Daniel Brammall was duly licensed to the said curacy: and, after such nomination and license as aforesaid, the said Daniel Brammall read the prayers, articles, and certificate, and read and made the declarations and other matters and things required by the statute 13 & 14 Car. 2, c. 4, as prescribed by the said statute. And, after the 25th of December, 1840, the rent reserved by the said last-mentioned lease was paid by the defendant to the said Daniel Brammall for and in respect of the said premises in the said lease mentioned, up to and inclusive of the 25th of December, 1845, and with a knowledge of its contents. And his agent, in 1844, inspected the mines, under the authority given by the lease for that purpose.

Since the 25th of December, 1845, no rent has been received by the said Daniel Brammall from the defendant.

On the 22d of June, 1846, the said Daniel Brammall served the defendant with a notice in writing, requiring him to quit the said premises on the 24th of December then next, or at the expiration of the current year of his tenancy.

On the 30th of December, 1846, the said Daniel Brammall demanded possession of the said premises from the defendant; but he refused to give up possession; whereupon this action has been brought.

The said James Hordern was alive at the time of the trial.

The question for the opinion of the court is, whether the plaintiff is entitled to recover in this action. If the court shall be of that opinion, then the said verdict shall stand: but, if the court shall be of a contrary *948] *opinion, then a verdict shall be entered for the defendant, or a nonsuit, as the court shall see fit to order.

The court is to be at liberty to draw any inferences of fact which a jury might draw.

Hugh Hill (with whom were *Tatham* and *Sumner*), for the plaintiff It appears from the case, that The Nether Hill Estate has, for more than one hundred years, belonged to the perpetual curates of Shaw chapel, as part of the augmentation; and that, for more than twenty years prior to the leases being granted, the surface has been occupied by tenants from year to year. A demise of the land will not authorize the lessee to open mines therein: *Vin. Abr. Mines* (A. 2.); (a) *Astry v.*

said Daniel Brammall to the said perpetual curacy, with its rights, members, and appurtenances, and to do and execute all other things in this behalf which shall belong to your lordship's episcopal office. In witness whereof, I have hereunto set my hand and seal, this 10th day of March, 1841.

THOMAS BLACKBURN, L. C.

"Signed, sealed, and delivered by the above-named Thomas Blackburne, in the presence of

"G. Cornwall Legh,

"High-Legh, Cheshire."

See, *Clitling & Co. Rep.* 12.

Ballard, 2 Lev. 185. In September, 1830, the estate was demised to the defendant, together with the mines, for the term of fifty years, if the grantor should so long live, reserving an annual rent. Clegg, who had before held the land, as tenant from year to year, continued in the occupation of the surface, paying rent to the lessee, instead of to the curate. The mines were opened in 1832, and continued to be worked down to the year 1839, when the lease in question was granted,—the parties to it being, the curate, James Hordern, of the first part, the ordinary of the second part, the Rev. Thomas Blackburne, the immediate patron, of the third part, and the defendant of the fourth part. The demise is of the land, and of all mines of coal, &c., with power to sink shafts, &c., to erect cottages for workmen, engines, &c., to get stone and gravel, dig clay, make bricks, &c., &c., for twenty-one years, at the yearly rent of 250*l.*, with a proviso for re-entry on non-payment of the rent, a covenant to permit Hordern and his agents to inspect the mines, and a proviso for the *determination of the lease at the expiration of the first seven or fourteen years, on giving twelve months' notice,—50*l.* of the rent to be paid yearly into the hands of the governors of Queen Anne's Bounty, for the purpose of augmenting the curacy of Shaw. [*949]

This lease was void: and it is not made good by the receipt of rent by Brammall, the present curate, or by the circumstance of his agent's having inspected the mines: the receipt of rent, at the most, created only a tenancy from year to year.

The nature of the estate of a perpetual curate is very much considered in *Doe d. Richardson v. Thomas*, 9 Ad. & E. 556, where most of the authorities are collected. It was there held that land which has been annexed to a perpetual curacy of a parish, by the Governors of Queen Anne's Bounty, under the 1 G. 1, stat. 2, c. 10, ss. 4, 21, cannot be leased by the curate so as to bind the successor, if the patron only consents, and not the ordinary. The 4th section of that statute recites that Queen Anne's bounty "was intended to extend, not only to parsons and vicars who come in by presentation, or collation, institution and induction, but likewise to such ministers who come in by donation, or are only stipendiary preachers, or curates, officiating in any church or chapel where the liturgy and rites of the church of England as now by law established, are and shall be used and observed, most of which are not corporations, nor have a legal succession, and therefore are incapable of taking a grant or conveyance of such perpetual augmentation, as is agreeable to the intention of the late Queen:" and it enacts "that all such churches, curacies, or chapels which shall, at any time hereafter, be augmented by the governors of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy, *shall be, [*950] and are hereby declared and established to be, from the time of such augmentations, perpetual cures and benefices, and the ministers

duly nominated and licensed thereunto, and their successors respectively, shall be and be esteemed in law, bodies politic and corporate, and shall have perpetual succession by such name and names as in the grant of such augmentation shall be mentioned, and shall have a legal capacity, and are hereby enabled to take in perpetuity to them and their successors, all such lands, tenements, tithes, and hereditaments, as shall be granted unto or purchased for them respectively by the said governors of the bounty of Queen Anne, for the augmentation of the maintenance of the poor clergy." And the 21st section enacts, that, if the governors "shall, by any deed or instrument in writing under their common seal, allot or apply to any church or chapel, any lands, tithes, or hereditaments, arising from the said bounty, &c., and shall declare that the same shall be for ever annexed to such church or chapel, then such lands, tithes, and hereditaments shall from thenceforth be held and enjoyed, and go, in succession, with such church and chapel for ever." By force of that statute, a curacy augmented by the governors of Queen Anne's bounty, becomes a *benefice*, within the definition of that word in Co. Litt. 300 b, §§ 644, 5, 6, 8, and 2 Inst. 29. The result is, that a perpetual curate has no higher estate than a vicar has, at common law. Now, this is not a valid lease, by the common law; it wants the confirmation of the patron of the advowson. In Bac. Abr. *Leases*, (G)2,(a) it is said: "If there be a patron paramount, as well as an immediate patron, confirmation of the immediate patron, without the other's confirmation, is not good: as, if a *951] parson be patron of a vicarage of the same church, *and the vicar makes a lease, confirmed by the parson and ordinary, this is not good, without the confirmation of the patron of the rectory also, because both have an interest in the possessions of the vicarage." So, in Watson's Clergyman's Law,(b) it is said: "That the patron's confirmation may be sufficient, no other person ought to have any interest in the patronage, but the patron or patrons that do confirm; for, those grants that are confirmed, being to bind successors, are in the nature of a charge upon the advowson, and therefore ought to be directed by the estate which the confirmer hath, and, being derived out of the estate of the advowson, can endure no longer than the estate of the patron confirming doth abide.(c) Accordingly, if there be a patron paramount, as well as an immediate patron, confirmation of the immediate patron, without the other's confirmation, is not good: for instance, if a parson be patron of the vicarage of the same church, and the vicar doth make a lease confirmed by the patron and ordinary only, this is not good, without the confirmation of the patron of the rectory also." The nature and character of a perpetual curate's interest is very fully gone into in Lord DENMAN's judgment, in *Mason v. Lambert*, 17 Law Journ., N. S., Q. B. 366.

(a) Citing Co. Litt. 300 b; Complete Incumbent, 372.

(b) Edit. 1747, p. 479.

(c) Citing Co. Litt. 306 b; Maund and French's case, 1 Roll. Rep. 361; 1 Roll. Abr. 480, translated and commented on, 5 Vin. Abr. 375, title *Confirmation* (N), pl. 1.

Further, it is submitted that the lease in question is avoided by the restraining statute of 13 Eliz. c. 10; s. 3, which,—reciting “that long and unreasonable leases, made by colleges, deans and chapters, parsons, vicars, *and other having spiritual promotions*, be the chiefest causes of the dilapidations and the decay of all spiritual livings and hospitality, and the utter impoverishing of *all successors, incumbents in the same,”—enacts, “that, from henceforth, all leases, gifts, grants, [952 feoffments, conveyances, or estates, to be made, had, done, or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other having any spiritual or ecclesiastical living, or any houses, lands, tithes, tenements, or other hereditaments, being any parcel of the possessions of any such college, cathedral church, chapter, hospital, parsonage, vicarage, or other spiritual promotion, or any ways appertaining or belonging to the same, or any of them, to any person or persons, bodies politic or corporate (other than for the term of one-and-twenty years, or three lives, from the time as any such lease or grant shall be made or granted, whereupon the accustomed yearly rent or more shall be reserved and payable yearly during the said term), shall be utterly void and of none effect, to all intents, constructions, and purposes, any law, custom, or usage to the contrary any ways notwithstanding.” These words are sufficient to include a perpetual curacy. In Bacon’s Abridgment,(a) it is said that this statute “hath been always construed largely and beneficially, to prevent all inventions and evasions against the true intent thereof.”

This is not a good lease within the enabling statute of 32 H. 8, c. 28.(b) The things necessarily to be *observed in making such a [953 lease, are enumerated in Co. Litt. 44 a, 44 b. Amongst others, “it must be of lands or tenements which have most commonly been letten to farm, or occupied by the farmers thereof by the space of twenty years next before the lease made.” Here, prior to the year 1839, the surface only had been demised, and not the mines. In *Doe d. Tennyson v. Lord*

(a) *Title Leases and Terms for Years* (E.) 1, pl. 6, citing Magdalen College’s case, 11 Co. Rep. 76.

(b) The second section of which enacts “that this act, or any thing contained, shall not extend to any leases to be made of any manors, lands, tenements, or hereditaments, being in the hands of any fermor or fermors by virtue of any old lease, unless the same old lease be expired, surrendered, or ended within one year next after the making of the said new lease; nor shall extend to any grant to be made of any reversion of any manors, lands, tenements, or hereditaments, nor to any lease of any manors, lands, tenements, or hereditaments, which have not most commonly been letten to farm, or occupied by the fermors thereof, by the space of twenty years next before such lease thereof made; nor to any lease to be made without impeachment of waste; nor to any lease to be made above the number of twenty-one years, or three lives, at the most, from the day of making thereof; and that upon every such lease there be reserved yearly during the same lease, due and payable to the lessors, their heirs and successors, to whom the same lands should have come after the deaths of the lessors, if no such lease had been thereof made, and to whom the reversion thereof shall appertain, according to their estates and interests, so much yearly ferm or rent, or more, as hath been most accustomably yielded or paid for the manors, lands, tenements, and hereditaments so to be letten within twenty years next before such lease thereof made,” &c.

Yarborough, 1 Bing. 24, 7 J. B. Moore, 258, waste land belonging to a vicarage, which land had remained waste and unenclosed from the inability of the vicars to incur the expense of enclosure, was let (having never been letten before) by the incumbent (with the confirmation of patron and ordinary) for three lives, the lessee undertaking to reclaim the land, and to pay a rack-rent which was the most that could be obtained: and it was held that this lease was not binding on the incumbent's successor. DALLAS, C. J., there says (7 J. B. Moore, 265): "The words of the statute 13 Eliz. c. 10, are, that 'all leases by any parson or vicar other than for the term of twenty-one years or three lives, whereupon the accustomed yearly rent, or more, shall be reserved yearly during the term, shall be utterly void.' This can only apply to *954] lands which *have been formerly or commonly let or demised.

Some rent must have been previously reserved, *viz.* the accustomed rent, or more: and, in *The Bishop of Hereford v. Scory*, Cro. Eliz. 874, it was resolved that the statute of Elizabeth (*a*) ordains that no lease shall be good unless warranted by the statute 32 H. 8; and that, as the former statute appoints that the ancient rent shall be reserved, it is thereby limited and intended that the land should have been usually demised; for, otherwise, the ancient rent could not be paid for it. That case is precisely in point: and, as both the statutes must be taken together, I am clearly of opinion that the lease and confirmations in this case, are not binding on the lessor of the plaintiff." In *Doe d. Bartlett v. Rendle*, 3 M. & Selw. 99, under a devise of lands to trustees and their heirs, in trust to the use of W. B. B. and his first and other sons in strict settlement, remainder to J. B. and his first and other sons in strict settlement, with power to the trustees, from time to time during the minorities of the persons to whom the premises should descend, and to any tenant for life, to grant any lease of *all or any part of the lands so limited, so as there be reserved the ancient and accustomed yearly rent, &c.*,—it was held that a lease by W. B. B. of part of the lands devised, in several parcels, in one of which parcels were included, together with lands anciently demised, two closes never before demised, at one entire rent, *viz.* the ancient rent for that part which had been anciently demised, was void for the whole of the lands included in that parcel, as well the lands never before let, as those anciently let. In *Campbell v. Leach*, Ambler, 740, 2 Sugden on Powers, 7th edit. p. 600, tenant for life of an estate on which mines were opened, with power to *955] grant leases in *possession for twenty-one years, reserving the best rent, leased the mines, opened and unopened, for twenty-six years, without reference to the power, and before the expiration of a former lease, reserving ore as rent to him, his heirs and assigns: and it was decreed that the lease should bind the remainder-man for twenty-one years; and, the rent reserved not being a gross sum for all the mines,

(a) Referring to the 1 Eliz. c. 19.

but separate on each, that the power was well executed as to the open mines, but not as to the mines unopened.

Again, the lease is void, by the 32 H. 8, c. 28, s. 2, inasmuch as it enables the lessee to commit waste: The Dean and Chapter of Worcester's case, 6 Co. Rep. 37 a; Knight v. Moseley, Ambler, 176; Wither v. The Dean and Chapter of Winchester, 3 Meriv. 421. In Knight v. Moseley, Lord HARDWICKE says: "The parson has a fee-simple qualified and under restrictions, in right of the church; but he cannot do everything that a private owner of an inheritance can. He cannot commit waste, *nor open mines*, but may work those already opened. Even a bishop cannot. Talbot, Bishop of Durham, applied to parliament to enable him to open mines, but rejected." This is, in fact, not a lease, but a parting with the actual property of the church. The 6th section of the 5 & 6 Vict. c. 108, enables ecclesiastical corporations, aggregate or sole, to grant leases of mines; but, by s. 14, it is provided that a portion of the improved value under such leases shall be paid to the ecclesiastical commissioners for England.

It will be urged, on the other side, that the lease in question has been set up by the receipt of rent under it by Mr. Brammall since the year 1840, and by exercising the right of inspecting the mines under the *power for that purpose contained in the lease. The lease, however, being absolutely void, no act done by the lessor's successor [*956 could have the effect suggested. In Bacon's Abridgment, title *Leases and Terms for Years* (H), it is said: "As to leases by parsons, vicars, &c., if by the common law any of these had made a lease for years of any of the possessions of their church, without confirmation of patron and ordinary, &c., such leases by their death or other avoidance had become absolutely void, without entry or other ceremony, so as no acceptance of the rent, or other act done by the successor, could affirm or make them good or binding over against themselves. But leases for years by bishops, abbots, &c., though without confirmation of the dean and chapter, or assent of the convent, were not absolutely determined by their death, &c., but continued good till some act done by the successor to avoid them: for, they have, and always were allowed to have, the whole fee-simple and inheritance of their possessions in themselves; and therefore, before the third council of Nice, anno 710, might, by their sole alienation, without the confirmation of the dean and chapter, have bound their successor for ever: and though by that council such alienations are restrained, as hurtful and injurious to the church, and the confirmation of the dean and chapter made necessary, yet this is only *quoad* binding the successor; for, the fee-simple continues still in them; and therefore leases for years made by them subsist after their death or removal, as they would do if they had been made by a tenant in fee of any lay possessions, till the successor comes to avoid them by aid of the canons made at that council, which have received a sanction from our law."

The like is laid down in Comyn's Digest, title *Estates by Grant* (G. 5); and it is *added—"and the acceptance of rent by the successor *957] does not make it (the lease) good for his time." In *Rickman v. Garth*, Cro. Jac. 173, it was held that a bishop's lease for a portion of tithes, for three lives, reserving the ancient rent, is void, for the ancient rent cannot be reserved; and it is not made good against the successor by the acceptance of rent. *Doe d. Simpson v. Butcher*, 1 Dougl. 50, and *Doe d. Potter v. Archer*, 1 Bos. & Pull. 531, are authorities to the same effect. The acceptance of rent in such a case is at the most only evidence of a tenancy from year to year: *Roe d. Jordan v. Ward*, 1 H. Blac. 97; (a) *Doe d. Tucker v. Morse*, 1 B. & Ad. 365; *Doe d. Pennington v. Toniere*, 18 Law Journ., N. S., Q. B. 49.

Cowling, for the defendant. It must be conceded that there had been no demise of the mines prior to the year 1830. But it is submitted that the lease in question is good at common law; that, by the statute 13 Eliz. c. 10, it is voidable only, and that the acceptance of rent under it by Brammall had the effect of making it, as against him, a valid lease.

The validity of the lease at common law, depends upon the nature and quality of the estate of a perpetual curate. Before the statute 1 G. 1, stat. 2, c. 10, a perpetual curate could not be said to be seised of the lands belonging to the church. But the 4th section of that act gives him the same sort of interest that a bishop has in the lands belonging to the see: he (the bishop) has a fee at common law, though he cannot convey without confirmation by the dean and chapter. (b) *Speaking *958] of the estate of the perpetual curate, in *Doe d. Richardson v. Thomas*, LITLEDALE, J., says (9 A. & E. 372): "To all intents and purposes, his estate resembles that of an archbishop, who can no more sell than a parson. The curate has not the land, to him and his heirs; but he has it, to him and his successors; I think, therefore, that he has, within the meaning of the statute, an estate in the nature of a fee-simple." It is, however, of little importance whether he is seised in fee or for life. It is true, he cannot convey away, without the consent of the ordinary and the immediate patron. They are the only persons interested. In the case of a vicarage, it is otherwise; because the vicarage is carved out of the rectory. Here, however, the estate is given by third parties—the governors of Queen Anne's bounty. The court of King's Bench, in *Doe d. Richardson v. Thomas*, seem to have assumed that a perpetual curate is within the restraining statute of 13 Eliz. c. 10. But it has been held that the provisions of the enabling statute of 32 H. 8, c. 28, are to be imported into it. Therefore, a lease of unopened mines, not demised within twenty years before, may be voidable.

The acceptance of rent by Brammall, and the exercise of the right of inspection of the mines pursuant to the covenants contained in this lease,

(a) And see *Doe d. Martin v. Watts*, 7 T. R. 83; *Right v. Dean of Wells v. Bawden*, 3 East 260; *Roe d. Brune v. Prideaux*, 10 East, 158.

(b) Co. Litt. 341, b.

clearly had the effect of setting it up, as against him: Bacon's Abridgment, title *Leases and Terms for Years* (H.) 2; *Wheeler v. Danby*, 1 Roll. Abr. 476, S. C.; (a) Viner's Abridgment, title *Confirmation* (D.) pl. 1, 3. Bacon distinguishes between things lying in grant and things lying in manurance. *Rickman v. Garth* was a lease of tithes, and so within the distinction. In **Wheeler v. Danby*, the lease was not a lease in possession, and was therefore *void* under the 1 Eliz. [*959 c. 19.

Hugh Hill was not heard in reply.

WILDE, C. J. It seems to be conceded, on the part of the defendant, that, if the lease of the 29th of September, 1839, has not received the confirmation of all necessary parties, it is void; and that no subsequent acceptance of rent by a successor of the lessor under it, could set it up. The common law recognises an interest in the patron, and requires him to be a consenting party to that which goes to diminish the value of the advowson. Here, the rector has joined, as a consenting party, in granting the lease: but the patron has not. The interest of the paramount patron is quite as great as that of the immediate patron: in each case it is a pecuniary interest: and the same reasons which require the confirmation of a lease by the one, apply equally to the other. That the owner of an advowson has a general interest in everything which relates to its value, cannot be questioned. Neither can it be denied that the law takes notice of the pecuniary value of an advowson. It seems to me that the case as stated is free from ambiguity. Its object was, to raise the question, whether or not the lease is a valid lease. To do this, the character as well as the names of the parties who concurred in the making of the lease, are fully disclosed. The curate, as curate, grants, and the Bishop of Chester, as ordinary, and the Rev. Thomas Blackburne, the rector, as patron of the chapelry, concur. But, where is the patron of the rectory? He is also a necessary party: and, for want of his concurrence, the lease is void.

Then, what was the effect of the acceptance by the successor of the curate of the rent reserved by the *lease? The lease being *void*, [*960 the only effect of the acceptance of rent, could be, to create a tenancy from year to year between the parties. And that has been put an end to by a regular notice to quit. The plaintiff is therefore entitled to judgment.

COLTMAN, J. This appears to me to be a very plain case, and to be decided by the authorities collected in Bacon's Abridgment, title *Leases and Terms for Years* (E), where it is distinctly laid down that a lease of this description is void for want of confirmation by the patron paramount. The title *Leases* in that book has always been considered of high authority,—being generally attributed to Lord Chief Baron GIL-

(a) Cited in *Owen v. Thomas ap Rees*, Cro. Car. 95.

BERT.(a) It is quite clear from the way in which the case is framed, that the parties intended it to be understood that there was a patron paramount who had not joined in the lease in question. The want of that concurrence avoids the lease. And the defect is not aided by the subsequent acceptance of rent by the successor.

MAULE, J. This case has been very properly argued upon the true point that was intended to be raised. The authority of Bacon's Abridgment, title *Leases*, is indisputable: and, even without the aid of so high an authority, I should have felt no difficulty in coming to the conclusion that this is a void lease. The interest of the patron paramount is certainly as great as that of the immediate patron. Both should have joined.

CRESSWELL, J., concurred.

Judgment for the plaintiff.

(a) Co. Litt. 45, a. n. (5).

*961] *RAMSDEN v. GRAY and Others. May 29.

The first count of the declaration stated that the defendants agreed to sell to the plaintiff twenty tons of sal-enixon, to be delivered at a time and place mentioned, and alleged for breach the non-delivery pursuant to the contract.

The second count, "for a further breach of the said agreement and promise of the defendant, as aforesaid," stated, that, although the defendants, in part performance of the contract, delivered ten tons of an article resembling sal-enixon, as and for a part of the twenty tons so agreed to be delivered, yet that the defendants deceived the plaintiff in this, that the article delivered was not sal-enixon, but an article of a different and inferior description and value,—and alleged for special damage, that the goods had been returned to the plaintiff by the persons to whom he had sold them.

A judge at chambers having put the plaintiff to his election to retain one or other of these two counts, on the ground that they were founded on the same subject-matter of complaint, and were a violation of the 5th rule of Hilary term, 4 W. 4, the court refused to rescind the order.

THE first count of the declaration stated, that, before and at the time of the making of the promise by the defendants thereafter next mentioned, the defendants were, and still continued, the makers and manufacturers of certain merchandise called sal-enixon, and it was mutually agreed by and between the plaintiff and the defendants, that they should sell to the plaintiff twenty tons of sal-enixon of good merchantable quality, at the price of 11*l.* 11*s.* *per* ton, to be delivered to the plaintiff free on shipboard at Newcastle, &c., to be paid for by the plaintiff in cash; and that, although the period for the delivery of the whole of the said sal-enixon had elapsed long before the commencement of this suit, and the plaintiff, from the time of the making of the said agreement, was, and always had been, and still continued, ready and willing to receive and pay for the said twenty tons of sal-enixon, and in all respects to perform and fulfil the said agreement on his part,—yet that the defendants, with intent to deceive and defraud the plaintiff, neglected their said promise, and did not nor would, although often requested so to do, deliver to the plaintiff the said sal-enixon, or any part

*thereof, or any sal-enixon whatever, but had thenceforward wholly made default therein, and neglected and refused so to do, [*962
—to the plaintiff's damage, &c.

The second count stated, that, for a further breach of the said agreement and promise of the defendants as aforesaid, the plaintiff further said that he had always been, from the time of making the said agreement hitherto, ready and willing to receive and pay for the said sal-enixon, according to the terms of the said agreement, and in all respects to perform the said agreement on his part to be performed as aforesaid, —of all which the defendants had notice; yet that the defendants further disregarded their said promise, and, although they did, after the making of the said agreement, deliver to the plaintiff, in alleged and pretended part performance of their said promise, a certain quantity, to wit, ten tons, of certain merchandise exactly resembling in appearance the said article called sal-enixon, as and for a part of the said twenty tons of sal-enixon so agreed to be delivered by the defendants under their said agreement, and the plaintiff then, relying on their said promise, received the same as and for sal-enixon, and did also pay for the same in cash, yet the defendants craftily and knowingly deceived the plaintiff, in this, to wit, that the said merchandise so delivered by the defendants to the plaintiff as last aforesaid, was not, nor was any part thereof, sal-enixon, but, on the contrary thereof, was a certain other article, to wit, nitrate of soda cake, exactly resembling in appearance the said article called sal-enixon, but of greatly inferior value, to wit, to the amount of 10*l.* *per* ton, and of different properties, qualities, and uses, as the defendants, before and at the time of the said delivery thereof, well knew. The special damage alleged was, that the plaintiff, confiding in the promise of the defendants, sold the article so delivered to him by the defendants, to Messrs. Francis & Co., as sal-enixon, to be used in Messrs. *Francis & Co.'s manufactory of prussiate of [*963
potash, and that the article, not being sal-enixon, was useless to Messrs. Francis & Co., who returned the same to the plaintiff,—to the plaintiff's damage, &c. .

An order having been made by V. WILLIAMS, J., at chambers, for striking out one or other of these two counts, as being in apparent violation of the rule of Hilary term, 4 W. 4, r. 5,

Prideaux, for the plaintiff, now moved for a rule nisi to rescind that order. The two counts are founded upon totally different promises; the first is upon an executory contract for the sale and delivery of a quantity of sal-enixon, alleging for breach the non-delivery; the second is for a breach of warranty, resulting in special damage. [CRESSWELL, J. The expression in the sixth rule is, "founded on the same subject-matter of complaint."] The leading case upon this subject is *James v. Bourne*, 4 N. C. 420: there, the declaration contained a count on a promise to carry goods from Dublin to London, and a count on a promise to carry

the same goods from the wharf at which they should be landed in London, to the plaintiff's place of business; and it was held that the joining these two counts was not an apparent violation of the rule. In *Bleaden v. Rapallo*, 3 M. & G. 116, 3 Scott, N. R. 564, a count in case for employing a vessel let to hire to the defendant, in an illegal manner, whereby the vessel was rendered liable to forfeiture, was allowed to be joined with a count charging a breach of an express contract, in detaining the vessel longer than the stipulated time. So, in *Cahoon v. Burford*, 13 M. & W. 136, 2 D. & L. 234, a count in assumpsit to recover damages for the breach of a warranty of a horse, and a count in indebitatus assumpsit for money had and received (in the particulars stated to be the price of the horse),—not being for the same cause of action,—were allowed. In *Vaughan v. Glenn*, 5 M. & W. 577, the plaintiff declared, in the first count, on a charter-party whereby the defendant agreed to sail to Honduras, and there take on board a full cargo of mahogany, &c., and therewith proceed to London or Liverpool, and deliver the same, on being paid freight, &c., and alleged as a breach that part of the cargo delivered by the plaintiff at Honduras, and received by the master and crew, was not carried or delivered according to the agreement: the second count stated, that, in consideration that the plaintiff had caused certain goods, to wit, &c., to be taken to and loaded on board of the defendant's vessel in the bay of Honduras to be conveyed to England, for reasonable freight, &c., the defendant promised the plaintiff that due and proper care should be taken of the goods until they were loaded, &c., and assigned as a breach, that due and proper care was not taken of the goods until after they were loaded, but, on the contrary, that, by the negligence of the defendants, the goods, after they were delivered to the defendants, and whilst in their custody to be loaded, were lost:—and it was held, that those counts disclosed distinct subject-matters of complaint, and that the plaintiff was entitled to retain them both. [MAULE, J. A plaintiff must not describe the same contract in two different counts. That, I think, is very hard: but, nevertheless, it is the law. Are not the two counts in this case founded upon the same contract, and the same subject-matter of complaint?] Clearly not the same subject-matter of complaint,—the one being founded upon a contract to supply certain goods at a given price,—and the other being for the breach of a warranty, arising out of a subsequent delivery of goods with a false statement that they were the goods contracted for. [WILDE, C. J. Would not the same evidence support both counts?] Probably the same facts would be evidence in support of each count: but that is not conclusive. In *Deere v. Ivey*, 4 Q. B. 379, the plaintiff, in assumpsit, declared, in one count, that, in consideration that he, at the defendant's request, would buy of the defendant a horse, the defendant promised that the horse was sound; that the plaintiff bought the horse; but that it was not sound. In a

subsequent count, the plaintiff declared, that, in consideration that he, at the defendant's request, would buy of the defendant a certain other horse, the defendant promised that the horse was quiet, and had no vice, except that he was given to biting when he was saddled, or approached for the purpose of being saddled, or cleaned. In each count, a breach of the promise in that count was alleged. Non assumpsit was pleaded to the whole declaration. On the trial, one contract of sale and warranty only was proved; and damages were given on the two counts collectively. The court directed a new trial, on the ground that the plaintiff could not recover upon the two counts for the same subject-matter of complaint. Here, the promises, in law, are distinct, though the contract may be the same. *Bleaden v. Rapallo* is precisely in point. [WILDE, C. J. There were there two distinct subject-matters of complaint: the first count charged an illegal use of a chartered ship, whereby a risk of seizure was incurred; the second was for detaining her longer than the stipulated period. In *Bridge v. Wain*, 1 Stark. N. P. C. 504, in assumpsit, it was alleged as a breach, that certain goods sold and delivered to the plaintiff, and warranted to be scarlet cuttings, were not scarlet cuttings; *per quod* they *became and were of no use or value to the plaintiff: and the plaintiff was held entitled, without further allegation of special damage, to recover as much as the goods would have been worth to him had the contract been faithfully performed by the defendant. The first count here is only another mode of alleging a warranty.] In *Hartley v. Harman*, 3 P. & D. 567, where the declaration stated a contract of service for certain yearly wages, subject to be determined at a month's notice, and alleged that the defendant dismissed the plaintiff without a month's notice, by means whereof the plaintiff lost all the wages, profits, &c., which he might have acquired from being continued in the service,—it was held that the plaintiff was only entitled to recover as damages wages for one month, and that the arrears of salary due to him at the time of dismissal could alone be recovered in indebitatus assumpsit for work and labour. But, in a subsequent case, PARKE, B., says that the declaration might have been so framed as to include the whole. [*966]

The order is also open to a technical objection. It is drawn up "on hearing the attorneys or agents on both sides" only; whereas, according to the case of *Roy v. Bristow*, 5 Dowl. P. C. 452, it should have been drawn up "on reading the declaration," or upon affidavits showing that the two counts are identical. [MAULE, J. *Roy v. Bristow* is altogether a different case from this. The objection there was, that the *rule nisi* did not refer to any affidavit or other thing upon which it was founded. A judge's order is commonly drawn up "upon hearing the attorneys or agents" only.]

WILDE, C. J. Looking at this declaration, it appears to me that the two counts are founded on one and the same principal matter of com-

*967] *plaint, and are in *apparent violation of the 5th rule of Hilary term, 4 W. 4. Both counts evidently refer to the same contract. They are but different modes of setting out the same contract and the same breach,—the non-delivery of the article sold. It is true that the second count brings forward a new head of special damage, which might as well have been inserted in the first count. But there is nothing to repel the presumption that both counts are in reality founded upon the same contract, and the same subject-matter of complaint. I therefore think the order of my brother WILLIAMS was right. Though the introduction of the two counts is an apparent violation of the rule, the plaintiff might, if the fact were otherwise, have shown it by affidavit; or he might have availed himself of the alternative offered by the 6th rule.*

COLTMAN, J. I think there is reasonable ground for a surmise that these two counts are a mere splitting up of the same contract, and consequently an express violation of the rule. The first example given seems to me to be closely applicable,—“Counts founded upon the same contract, described in one as a contract without a condition, and in another as a contract with a condition, are not to be allowed; for, they are founded on the same subject-matter of complaint, and are only variations in the statement of one and the same contract.” This is just a case in which two counts might be allowed, upon the plaintiff’s satisfying the judge that some distinct subject-matter of complaint was *bonâ fide* intended to be established in respect of each count. But that he did not choose to do.

MAULE, J. I also think the order of my brother WILLIAMS was well made. The language of the 6th rule,—“Where more than one count,
*968] &c., shall have *been used in apparent violation of the preceding rule, &c.,—is equivocal. “Apparent violation” may mean that the two things may be, and clearly appear to be, the same,—as in the expression “*heir apparent* ;” (a) or,—as more popularly used,—that they appear to be the same, whether they are so or not. In the new rules the expression is evidently used in the latter sense; and means this,—that if the two counts be such that any person conversant with pleading, looking at them, would say that they are founded on the same subject-matter of complaint, the 5th rule is violated. The language of the 6th rule confirms this view. I think it is quite clear that two counts have been resorted to here for the purpose of avoiding the difficulty of amendment. The power of amendment given by the statute 3 & 4 W. 4, c. 42, s. 23, does not, in practice, supply the place of a plurality of counts, as it was intended, and recited in the new rules, to do. Still, for the reasons already given, I am of opinion that the rule should be refused.

CRESSWELL, J. I am of the same opinion. It appears to me that these two counts are founded on the same contract, and on the same breach of it, merely with a different statement of damage. Rule refused.

(a) The term “*heir apparent*” was formerly understood in a less absolute sense, and was used so as to include an “*heir presumptive*.”

***BUTLER v. FROST and Another. June 2. [*969**

Upon a motion for judgment as in case of a nonsuit, for not proceeding to trial after notice, the affidavit need not allege that *due* notice of trial has been given.

It is no objection to a rule for judgment as in case of a nonsuit, founded on an omission to proceed to trial pursuant to a notice, that such notice was given at an earlier period than, for anything shown by the defendant, it need have been given.

WILKINS, Serjt., obtained a rule for judgment as in case of a nonsuit, upon the ordinary affidavit, stating that issue was joined on the 2d of May, and notice of trial given on the part of the plaintiff for the sittings after last Easter term, at Westminster, and that the plaintiff did not proceed to trial pursuant to the notice.

H. Coles now showed cause. The affidavit upon which the motion is founded, is insufficient: it does not state that *due* notice of trial was given; nor does it negative that the cause was not tried, by reason of its having been made a remanet. Issue was not joined until the 2d of May, and the sittings commenced on the 9th: there was, therefore, not time for the proper notice of trial. In *Ranger v. Bligh*, 5 Dowl. P. C. 235, 2 Harr. & W. 299, it was held, that, if a plaintiff gives notice of trial for a sitting earlier than is necessary by the practice of the court, and afterwards gives another notice of trial for a later sitting, but which is still within due time, the defendant is not entitled to judgment as in case of a nonsuit, although the plaintiff has not proceeded to trial under his first notice, nor countermanded it.

WILDE, C. J. We cannot intend that the notice of trial was irregular. The defendant was probably under terms to take short notice. If there was anything to justify the plaintiff in treating the notice he gave as a nullity, he should have shown it.

Coles producing an affidavit of excuse,

Rule discharged on a peremptory undertaking.

***BUTLER v. FOX. June 8. [*970**

A declaration on a policy of assurance from Baltimore to Liverpool, alleged a loss by perils of the sea.

The court refused to allow the venue to be changed from the southern division of Lancashire to London, upon the usual affidavit that the cause of action arose in London and not elsewhere, the declaration showing that such statement could not be correct;—although the policy was effected in London, and the loss was payable there.

THIS was an action upon a policy of insurance on goods “at and from Baltimore to Liverpool.” The declaration alleged a total loss by perils of the sea, and assigned for breach the non-payment of the amount insured. The venue was laid in South Lancashire.

James Wilde, upon an affidavit that “the plaintiff’s cause of action

(if any) arose in the city of London, and not in the southern division of the county of Lancaster, or elsewhere out of the city of London," moved to change the venue to London. [WILDE, C. J. How can the cause of action upon a policy of insurance be said to arise in London and not elsewhere?] The cause of action would be the non-payment of the money; and it is the course of business to pay in London all losses on policies effected in London. Formerly, it was the practice not to change the venue in actions upon written contracts: but in *Mondel v. Steele*, 8 M. & W. 640,^(a) PARKE, B., in delivering the judgment of the court of Exchequer, after reviewing the authorities, says: "We think it cannot be laid down as a general proposition, that the venue is not to be changed in actions upon contracts appearing by the declaration to be in writing. There does not seem to be any principle, and but little precedent, in support of so extensive an exception to the general rule, which, in conformity with the statute law, is, that actions should be tried where the causes of action arise: and the exceptions to that rule should *971] not be too readily extended. We think, that, in all actions on contracts, though in writing, except on specialties, bills, and notes, the venue may be changed upon the usual affidavit being made. At all events, it may be changed in an action on such a contract as this,^(b) which is to be performed, not anywhere, but in a particular place, and for the breach of which the cause of action arises wholly in one county." And in *Martin v. Daws*,^(c) the same learned judge expressed an opinion, that, "since the case of *Mondel v. Steele*, it was to be considered that the rule which prohibited the change of venue, applied only to actions of debt or covenant on a specialty, and to bills or notes, and therefore not to an action upon an award, which, although under seal, was not a specialty." [WILDE, C. J. There certainly has been a very general impression that the venue cannot be changed in an action on a policy of insurance. The question is whether the recent cases have had the effect of altering the practice in this respect.] The court will take it, upon the affidavit, as sworn, that the cause of action arose in London, and not elsewhere. [MAULE, J. *Cailland v. Champion*, 7 T. R. 205, was an action on a policy of insurance on the life of a person who had lately died in Scotland; and it was brought in Middlesex. The defendant changed the venue to London, on the usual affidavit that the cause of action arose wholly in London: after which, a rule was obtained, calling on the defendant to show cause why the former rule for changing the venue to London should not be discharged, on the ground that the venue had been improperly removed to London, because the fact sworn to by the defendant could not possibly be true, namely, that the *whole* cause of action arose in London, the party whose life *was insured having died in Scotland. *972] And the court were of opinion that the venue should not have been

(a) *Vide* 5 Man. Gr. & S. 484.

(b) To build a ship for the plaintiff at Liverpool.

(c) 14 M. & W. 734. S. C. (but where this *dictum* does not appear), 1 D. & L. 279.

originally removed from Middlesex to London, for the reason above mentioned. That is a judicial decision that such an affidavit as this could not possibly be true. Substituting the death of the assured in the one case for the loss of the ship in the other, *Cailland v. Champion* is on all fours with this case. WILDE, C. J. That case also shows that the loss is the cause of action.] The question is whether that case is good law, or is applicable on the present occasion.

WILDE, C. J. There may possibly be cases in which the facts which would show the statement in the affidavit to be incorrect, may not appear. But when,—as is required in cases of this sort,—the declaration is produced, we must look at it to see if the affidavit is warranted. Without saying whether or not the venue may in any case on a policy of insurance be changed upon the ordinary affidavit, let us see what are the facts of this case. Here is a policy upon goods at and from a foreign port to a port in this country, and a loss happening on that voyage. We are not to assume a possible case, but must suppose that the loss occurred according to the ordinary course. The declaration charges a breach in the non-payment of the money. It is said that the non-payment of the money is the whole cause of action. But is that so? The matter is not *res integra*; for, it appears to have been decided by the court of King's Bench, so long ago as in the time of the 7th Term Reports, that, where an assured upon a life-policy made in London, died in Scotland, an affidavit that the *whole* cause of action arose in London was not true. There have been many cases since in which it would have been very convenient to change the venue, if it could have been done. I have myself been *concerned in several. But I have always considered that it [973 could not be allowed. We start, therefore, with a distinct authority against this application: and no one of us can recollect or discover a case that looks the other way. *Martin v. Daws* is a very strong case. That was an action of assumpsit for not surrendering to the plaintiff certain copyhold premises, pursuant to an award,—which was much the same as if it had been a direction to pay money. The venue was laid in London. A motion was made to change it to Sussex, on the usual affidavit that the cause of action arose in that county; and it was contended that, as the action was not *on an award*, the case was not within any rule which prevented the venue from being changed in such actions, and which applied only to cases where the mere production of the instrument entitled the plaintiff to recover: and that, even if the action had been on an award, *Mondel v. Steele* was an authority to show that the venue might be changed in such an action. Upon granting the rule, PARKE, B., expressed the opinion which has already been adverted to. The rule having been granted to change the venue, an application was afterwards made to discharge it, on the ground that the case was not one in which the venue could be changed on the ordinary affidavit. After argument, the court held that the action was an action on the award,

within the meaning of the rule: and Lord ABINGER, C. B., said: "We cannot take the law from the casual expressions of judges, but must look to decided cases. The case of *Stanway v. Heslop*, 3 B. & C. 9, 4 D. & R. 635, is a direct authority that the courts will not change the venue in an action on an award. ABBOTT, C. J., there says, 'There is not any case deciding that the venue may be changed in an action on an award, *974] and, as the contrary has been held *in the court of Common Pleas,' —alluding to *Whitburn v. Staines*, 2 Bos. & Pull. 355,—'We think it best that the practice of this court should be conformable to that decision.' I think the practice has been settled by those decisions." It appears to me that that case distinctly recognises the principle which is applicable to the present. No authority, therefore, having been cited in support of the motion, and there being authorities that strike me as satisfactory the other way, I am of opinion that no rule should be granted.

MAULE, J. I do not think that this rule should be refused upon the ground that the venue cannot be changed in an action upon a policy of assurance; although that seems formerly to have been the inclination of the courts, probably because policies were usually under seal. It was thought, that, in the case of specialties, it could not properly be predicated that the *whole* cause of action arose in a particular place. Still, that only remits it to the general class of cases in which the venue may be changed. The courts very wisely and properly require in these cases, not merely an affidavit that the cause of action arose in the county or place to which it is sought to change the venue, and not elsewhere, but that the order be made upon reading the declaration. The authorities, it seems, show that deponents may be found who are bold enough to swear that the whole cause of action upon a policy of assurance arises in the place where the policy was made and the money is payable. In *Cailland v. Champion* the Court of King's Bench held, that, in an action upon a life policy, where the party had died in Scotland, it could not properly be sworn that the whole cause of action arose in London, where *975] the policy was effected. What *conscientious man could think of swearing that the whole cause of action upon a sea policy arose in London, where the voyage was from a foreign port to Liverpool, and the vessel never came within a thousand miles of London? Looking at the declaration, the affidavit in this case cannot possibly be true.

CRESWELL, J. I am of the same opinion. Looking at the declaration, it appears that the deponent has made a mistake in supposing that the cause of action arose in the city of London and not elsewhere.

V. WILLIAMS, J., concurred.

Rule refused.

HILL v. KEMPSHALL. *May 30.*

Where land is demised subject to a condition for re-entry on default in payment of the rent, the right of re-entry does not accrue until the rent has been duly demanded.

TRESPASS. The declaration stated that the defendant, on the 5th of June, 1847, with force and arms, broke and entered a certain dwelling house of the plaintiff, situate No. 2, Queen's Terrace, Queen's Road, Bayswater, in the parish of Paddington, in the county of Middlesex, and then and there ejected and expelled the plaintiff and her servants from the possession and enjoyment of the said dwelling-house, and kept and continued them so ejected and expelled for a long time, to wit, for the space of four days; whereby the plaintiff, during all that time, lost and was deprived of the use and benefit of the said dwelling-house; and was put to great inconvenience and much expense, to wit, 50*l.*, in *procuring and removing to another residence for herself and [*976 family; and other wrongs, &c.

Plea,—that, before the plaintiff became and was possessed of the said dwelling-house in which, &c., and before the said time when, &c., to wit, on the 2d of March, 1847, the defendant demised the said dwelling-house in which, &c., to one Mary Elizabeth Raybot, to hold the same to her the said Mary Elizabeth Raybot from the 25th of March, 1847, for the term of three years then next following, at a certain rent, to wit, 65*l.*, payable quarterly, to wit, on the 24th of June, the 29th of September, the 25th of December, and the 25th of March, in each year of such tenancy, and upon condition, that, if default should be made in payment of such rent as aforesaid, it should be lawful for the defendant, *within twenty-one days*, to enter into and take possession of the said dwelling-house and premises in which, &c.: that the said Mary Elizabeth Raybot held and enjoyed the said messuage under and by virtue of the said tenancy; and that the said tenancy therein continued until, and was subsisting at, the said time when, &c.: that, before the said time when, &c., to wit, on the 24th of June, 1847, a certain sum of money, to wit, 16*l.* 5*s.* of the rent aforesaid, for a certain time, to wit, one quarter of a year of the said tenancy, ending on a certain day, to wit, on the day and year last aforesaid, became and was due and in arrear from the said Mary Elizabeth Raybot, and at the said time when, &c., remained in arrear and unpaid,—of all which the plaintiff, before and at the said time when, &c., had notice: that the plaintiff became, and at the said time when, &c., was possessed of the said dwelling-house in which, &c., as assignee of the said Mary Elizabeth Raybot, and of the said tenancy in this plea aforesaid, and of the said interest of the said Mary Elizabeth Raybot in the said tenancy and the said dwelling-house *in which, &c.: and that thereupon the defendant after- [*977 wards, and within twenty-one days from the time when the said last-mentioned arrear of rent became and was due and payable, to wit, at the said time when, &c., the same being then unpaid, entered into the

said dwelling-house in which, &c., the outer door thereof being then open,(a) to take possession, and did then take possession thereof, for the non-payment of the said last-mentioned rent, as he lawfully might for the cause aforesaid; which were the supposed trespasses in the declaration mentioned,—verification.

Special demurrer, assigning for causes—that it is not alleged in the said plea that any demand of the rent was ever made of the plaintiff, or on the said premises, before the said entry of the defendant, and that, without such demand duly made, the defendant has no right of re-entry under the said agreement,—that the plea should have shown a forfeiture at common law of the said term previous to the said entry of the defendant,—that the plea should have disclosed the commencement of the defendant's estate, in order that the plaintiff, in reply, might have shown the defendant's estate, at the time of the making of the demise, to have passed away from him, or to have ceased or determined,—that the said plea is ambiguous and uncertain, in this, that it is ambiguous whether the defendant intends to rely on a forfeiture of the said term, in which case a demand of the rent ought to have been averred, or a right to enter and take possession of the said premises for any temporary or other purpose,—and that, as the said plea is framed, the plaintiff cannot safely reply thereto, &c. Joinder in demurrer.

*978] **Petersdorff*, in support of the demurrer. At common law, a demand of the rent prior to a re-entry for condition broken, was indispensable: and the reason is obvious, viz. that the tenant should have an opportunity of tendering the rent. In Comyns's Digest,(b) it is laid down, that, "in all cases of a subject, where an estate is upon condition to be void for non-payment of rent, the condition will not be broken if the rent be not demanded.(c) Though it appears that the party was not ready to pay, if a demand had been made.(d) Though the condition be upon a lease for years.(e) So, if there be a lease and a *nomine pænæ* for non-payment of rent, the rent must be demanded before he is entitled to the *nomine pænæ*."(g) This common law rule has never been in any degree qualified. It is true, that the lessor might have expressly stipulated for a right of re-entry without demand,—as in *Kavanagh v. Gudge*, 5 M. & G. 726, 6 Scott, N. R. 508; 7 M. & G. 316, 7 Scott, N. R. 1025; but he has not done so. [MAULE, J. If he lets the twenty-one days elapse, he cannot enter.] All that was to be ascertained, was, on what day the rent became due. This might have been a good plea, under the statute 4 G. 2, c. 28, s. 2,—one of the ob-

(a) *Quære*, the necessity for this allegation.

(b) Title *Rent* (D. 3). And see *Viner's Abridgment*, title *Rent* (L).

(c) Citing Co. Litt. 201 b; *Molineux v. Molineux*, Cro. Jac. 145.

(d) Citing Rol. Abr. 458, l. 17, 22 (1 Roll. Abr. 459, pl. 3, 5).

(e) Citing *Hanson v. Norcliffe*, Hob. 331, Sir W. Jones, 9; *Amhurst v. Palmer*, Hob. 331.

(g) Citing Rol. Abr. 459, l. 25 (1 Roll. Abr. 459, pl. 3, translated 5 Vin. Abr. 262, pl. 3); *Maund v. Gregory*, 7 Co. Rep. 28 b; *Grobham v. Thornborough*, Hob. 82; *Howell v. Sambach*, Hob. 133; *Tracy v. Dutton*, Palmer, 208.

jects of which was, to dispense with a demand: but it is not so pleaded. [MAULE, J. From what time does the entry put an end to the tenancy?] The tenancy would cease from the moment of entry under the condition. [MAULE, J. The plea would be good, whether the defendant had a *right to enter and determine the tenancy, or a right to enter [*979 and hold till payment.]

The plea is ambiguous. It does not disclose upon what ground the defendant relies for the right to re-enter, or whether his entry was for the purpose of putting an end to the demise, or for a temporary purpose. A demand may not be necessary, where the object of the entry is, not to determine the lease, but merely to enforce the payment of the rent. [MAULE, J. No points have been delivered on the part of the defendant.]

C. Jones, Serjt., contra. The condition in this lease is an unusual one. No demand was necessary. The rent was payable on the quarter days; and, if not paid on the day on which it accrued due, the lessor had a right to re-enter and take possession at any time within twenty-one days. [MAULE, J. Does the entry of the landlord put an end to the lease?] Yes. [MAULE, J. Then a demand was requisite.] The forfeiture was incurred on the rent being unpaid on the 25th of June: it was a complete forfeiture, on the landlord's choosing to avail himself of it. [MAULE, J. The tenant should have an opportunity of paying the rent, by having it demanded.] He might create the opportunity, by going and paying it. [MAULE, J. Where?] At the dwelling-house or last known place of abode of the landlord. [WILDE, C. J., referred to 1 Williams's Saunders, p. 287, n. (16), as to the requisites at common law, to entitle the reversioner to re-enter; the first being, a demand of the rent.(a) Whether a demand is necessary or not, must depend upon the language of the deed.

WILDE, C. J. This is a perfectly plain case. The plea shows a demise upon condition, with a power to *the lessor to re-enter upon condition broken, and determine the lease. The plea, however, [*980 showing no demand, shows no justification for the trespass complained of.

The rest of the court concurring, Judgment for the plaintiff.

(a) Citing Bro. Abr. title *Demaunde*, 19.

KINNERSLEY v. KNOTT. June 6.

Where, in describing a party in pleading, a single letter is prefixed to his surname, the court will intend it to be his full christian name, if a vowel; otherwise, if a consonant.

In a count upon a bill of exchange, by endorsee against acceptor, the defendant was described as "John M. Knott:—"Held, an insufficient description, and properly taken advantage of by demurrer.

ASSUMPSIT. The first count of the declaration stated that the plaintiff, by E. S. his attorney, complained of John M. Knott, who had been

summoned to answer the plaintiff by virtue of a writ issued on, &c. : For that whereas, on the 26th of February, 1848, William Henry Hyde made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the order of him the said William Henry Hyde the sum of 65*l.* 10*s.*, three months after the date thereof, which period had elapsed before the commencement of this suit ; and the defendant then accepted the said bill ; and the said William Henry Hyde then endorsed the said bill to the plaintiff,—of all which the defendant then had notice, and then promised the plaintiff to pay him the amount of the said bill, according to the tenor and effect thereof, and of the said acceptance and endorsement, &c.

The defendant demurred specially, assigning for causes—that the christian name of the defendant is not fully stated and set forth therein, *981] and that the *defendant is therein described as John M. Knott, and with that initial letter M. for his christian name, or one of his first names ;—that the christian name or first names of the defendant should have been stated and set forth in full, or else the plaintiff should have stated a sufficient cause or excuse for not so stating or setting the same forth,—that the description of the defendant by the said name of John M. Knott, and with that initial, is improper,—and that the declaration does not allege the full christian names or first names of the defendant, &c.

Joinder in demurrer.

Talfourd, Serjt., in support of the demurrer. The description of a defendant by the initials of his christian name only in a declaration, is clearly ground of demurrer, except in those cases where the defect is aided by the 12th section of the 3 & 4 W. 4, c. 42.(a) The point has been repeatedly discussed and distinctly decided. In *Appelmans v. Blanch*, 14 M. & W. 154, the omission of the christian name of a person mentioned in pleading, was, in the absence of an averment of excuse for such omission, held fatal. In *Esdaile v. Maclean*, 15 M. & W. 277, in a declaration against the drawer of a bill of exchange, the bill was alleged to have been drawn upon “one W. Watson ;” and it was held bad on demurrer, for not showing that the party was so described in the bill itself. In *Levy v. Webb*, 9 Q. B. 427, the declaration,— *982] against the acceptor,—stated that “one J. C. Pawle” made his bill of exchange, directed to the defendant, and thereby required the defendant to pay “to the order of the said J. C. Pawle,” &c., that the defendant “accepted the said bill,” that “the said J. C. Pawle” endorsed it to the plaintiff, and that the defendant did not pay : and it was, in

(a) Which enacts, “that, in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters or some contraction of the christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration, to designate such persons by the same initial letter or letters or contraction of the christian or first name or names, instead of stating the christian or first name or names in full.”

like manner, held bad. So, in *Gatty v. Field*, 9 Q. B. 431, to a count upon an account stated, the defendant pleaded, that, a horse-race being about to be run, an illegal lottery was set up, upon the terms that the adventurers therein should consist of seventy members, who should pay 15s. each; that "Mr. Richards" should be treasurer, and "Mr. Selway" the secretary; that the names of the horses should be put, on separate cards, in one box, and the names of the adventurers, on separate cards, in another box; that two disinterested persons should draw these cards by chance, one from each box, alternately; and that the person whose name was drawn next after the name of the winning horse, should be paid, out of the subscriptions, 24l.: the declaration then proceeded to aver, that the plaintiff, the defendant, and others became adventurers, and paid the same sum each to "Mr. Selway" and the defendants; and that the plaintiff became the winner, &c.: and it was held, on special demurrer, that the plea was bad, for not stating the christian names of the persons therein mentioned,—no reason being assigned for the omission. In delivering the judgment of the court in these two cases, Lord DENMAN says: "The question reserved for our consideration in the first of these cases, turned upon the insertion of initials only, instead of the full christian names; in the second, on the omission of christian names and substitution of 'Mr.' And we are of *opinion that, [*983 when such omission or substitution is made, not in the description of some written instrument, but in the statement of a transaction between the parties, on which the action turns, it is good ground of special demurrer. We must presume that every person has a christian name; and it ought to be stated, or reason assigned for the omission." In *Turner v. Fitt*, 3 Man. Gr. & S. 701, this court refused to set aside as frivolous a demurrer assigning for cause that the drawer of a bill, in a count by endorsee against acceptor, was described by the initials of his christian name only,—“I. B. Doe,”—without showing that he was so designated or described in the bill: and they came to a similar decision in *Nash v. Calder*, 5 Man. Gr. & S. 177, where the declaration, in an action by endorsee against acceptor, described the defendant as “William Henry W. Calder.” In *Lomax v. Landells*, 6 Man. Gr. & S. 577, the description of a party as “I. Shakspeare Williams,” was held sufficient: but the ground of that decision was,—as put by MAULE, J.,—that “a vowel which is in itself a word, and may be pronounced separately, may be a name; though a consonant, which is incapable of being pronounced without the addition of a vowel, cannot.” And in *Miller v. Hay*, 3 Exch. 14, in an action by endorsee against acceptor of a bill of exchange, the count was held bad on demurrer, for describing the defendant as “W. D. Hay.” PARKE, B., there says: “The defect is not a wrong, but an insufficient, designation of the defendant, and bad on the face of the declaration. Before the act for the amendment of the law, the defendant could not have pleaded a misnomer in abatement, if so

described, in most, if not all the cases, as he could not have truly stated that he was not known by that name; and yet it was a defect of which *984] advantage could be *taken in *some* form, and, being on the face of the declaration, a demurrer is the proper form." [MAULE, J. Sully, in his Memoirs,^(a) makes mention of a French nobleman at the court of Henry III., named François d'O., lord of Fresnes. It would seem, therefore, that a name may consist of a single letter.]

F. Robinson, *contrà*. The argument on the other side unwarrantably assumes that "John M. Knott," means "John," with the initial of a second christian name, followed by a surname. It may be a part of the surname, like the M. in M'Adam, M'Donald, M'Knight, &c.; or, the defendant may have been christened "John M." [MAULE, J. I think it must be assumed that "M." is an initial: it can have no sound by itself.] In *Lindsay v. Wells*, 3 N. C. 777, 4 Scott, 471, this court refused to set aside a declaration, on the ground that the plaintiff had therein described himself as "Henry H. Lindsay." In *Rust v. Kennedy*, 4 M. & W. 586, it was held, that, where in the writ and declaration in an action not upon a written instrument, the defendant is described by the initials of his name, the only remedy is, by summons to amend, under the 3 & 4 W. 4, c. 42, s. 11;^(b) and the court will not set aside the proceedings for irregularity. In *Braithwaite v. Harrison*, 1 D. & *985] L. 210, where, in an action on a bill of exchange, *by the endorsee against the acceptor, the declaration alleged that "one J. Bankes" made his bill, &c., a demurrer, on the ground that the christian name of Bankes ought to have been set out in full, or that it should have been alleged that he was designated by the initial letter only in the bill, was set aside as frivolous. The argument on the other side assumes that "E. M." would have been unobjectionable: if so, this is a mere case of misspelling, which would not amount to a variance: *Williams v. Ogle*, 2 Stra. 889. [MAULE, J. There, the name was "Segrave," instead of "Seagrave," and it was held no variance, *quia idem sonans*.]

The defendant admits by the form of the demurrer that he is properly described as "John M. Knott," in the declaration. This clearly would be a fatal objection to a plea in abatement: *Talland v. Germyn*, Comb. 188; *Roberts v. Moon*, 5 T. R. 487; *Docker v. King*, 5 Taunt. 652; *Comyn's Digest*, title *Abatement* (F. 17), pl. 4. [CRESSWELL, J. The authorities you cite do not bear out your position. MAULE, J. In truth, you are demurring to the demurrer.]

(a) Liv. VII. See also Moreri, as to this François, sieur d'O. de Fresnes et de Maillebois.

(b) Which enacts "that no plea in abatement for a misnomer shall be allowed in any personal action, but that, in all cases in which a misnomer would, but for this act, have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name, upon a judge's summons founded on an affidavit of the right name; and, in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit."

The court intimated to *Robinson* that he might amend his declaration. This, however, he declined to do.

Talfourd, Serjt., in reply. *Braithewaite v. Harrison* is overruled by the subsequent decisions. *Nash v. Calder*, and *Miller v. Hay*, are precisely in point.

WILDE, C. J. This point has been discussed and decided upon several occasions; and the result of the cases, is, that this demurrer is well founded, and must prevail. In *Nash v. Calder*, this court intimated a pretty plain opinion, not only that a demurrer to a *declaration, [*986 on the ground that the defendant had been described therein by the initial of one of his christian names, was not frivolous, but that it was one which was likely to succeed. The plaintiff seems to have very wisely acted upon the hint so given; for, nothing more was heard of the case. The attention of the court was in that case drawn to the very point that has been under discussion here; for, there, as here, there was one portion of the christian name of the party properly set out. The court of Exchequer, in *Miller v. Hay*, acted upon the authority of *Nash v. Calder*, and held that the objection was properly taken advantage of on demurrer. That, I think, the authorities show to be the proper course.

COLTMAN, J. I am of the same opinion. *Nash v. Calder*,—upon which the court of Exchequer rely in *Miller v. Hay*,—is not to be distinguished from the present case. I think the conclusion come to in those two cases was correct.

MAULE, J. The statute 3 & 4 W. 4, c. 42, s. 12, which enables a plaintiff, in declaring on a bill or note, or other written instrument, any of the *parties* to which are designated by initials of their christian names, so to designate them in the process or declaration, assumes that letters are used as initials of names. Seeing, therefore, a letter before the defendant's name, which cannot be sounded by itself, the court must treat it as an initial letter. The rule of pleading is, that the name of every person mentioned in a declaration or plea, must be fully and correctly set forth, or an excuse for the omission alleged. Here, the plaintiff had done neither the one nor the other. Where the letter used is a vowel, which is *vocalis* or *sonans*, and can be uttered, the courts have—and, I think, correctly,—been astute *to discover a reason for [*987 not allowing a demurrer on this ground to succeed, and have assumed it to be possible that it may be a christian name. Here, however, the letter used is a consonant, *consonans*, which can only be sounded with the aid of a vowel, and consequently cannot fairly be assumed to be a name by itself. The defendant's name, therefore, is left in uncertainty; and that, in my opinion,—adopting the view of the court of Exchequer, in *Miller v. Hay*, founded upon the previous decision of this court, in *Nash v. Calder*,—is an insufficient designation of the defendant, and bad on the face of the declaration. And the proper

way to take advantage of it is by demurrer. I therefore am of opinion that the defendant is entitled to judgment.

CRESSWELL, J., concurred.

Judgment for the defendant.

PENNELL and Others, Assignees of BURTON, a Bankrupt, v.
STEPHENS. *June 4.*

An intimation given by a clerk of a defendant's attorney, to a clerk of the plaintiff's attorney, that the defendant has committed an act of bankruptcy,—the clerk to whom it is given not being shown to be a managing clerk, or to have communicated the matter to his principal,—is not such a notice as will defeat an execution, under the proviso in the 2 & 3 Vict. c. 29, s. 1.

Quære, whether a notice to one who is shown to be a managing clerk would suffice?

THIS was a feigned issue to try whether, at the time of the seizure of the goods of one Burton, under an execution at the suit of the defendant, the defendant had had notice of an act of bankruptcy having been committed by Burton.

*988] The issue was tried before Lord DENMAN, at the *spring assizes for Surrey, in 1848. The facts that appeared in evidence were as follows:—An action had been brought by Stephens against the bankrupt, in which issue had been joined prior to the 6th of November, 1847. In that action, one Cox acted as the attorney of the plaintiff, and one Lloyd as the attorney of the defendant. On the 6th of November, Lloyd addressed a letter to Cox, as follows:—

“Burton ats Stephens.

“Dear Sir,—If your client means to press this action, Mr. Burton must go into the Gazette. Upwards of two-thirds of his creditors have consented to an arrangement, by which they will be paid their full demands, and interest, and costs: but there are now twenty creditors suing Mr. Burton; and I am pledged to the others not to allow any judgment to be obtained. I am therefore prevented from endeavouring to carry out the resolutions come to by the creditors, and am now applying to those who have commenced proceedings against Mr. Burton, to induce them to come in with the rest. In the event of their not doing so, I shall feel it to be my duty to lay the state of such proceedings before the creditors: and, as there will, in the event of the suing creditors not abandoning their proceedings, be an act of bankruptcy committed before any verdict can be obtained, the parties will have to pay their own costs. Pray write me that your client will do as the rest.”

On the 12th of November, Lloyd again addressed the following letter to Cox:—

“Stephens v. Carr. Same v. Burton.

“Dear Sir,—Mr. Carr has just waited upon and informed me that the

plaintiff in these actions is willing *to receive the amount claimed by him by instalments, as follows, *i. e.* 100*l.* on the 21st of December, 50*l.* on the 21st of January, 1848, 50*l.* on the 21st of February, 50*l.* on the 21st of March, and the balance on the 21st of April. Will you be kind enough to say *per bearer*, whether I may take out a summons to stay upon these terms. Of course, your costs will be provided for." [*989]

A summons was afterwards taken out to stay the proceedings, and an order thereupon drawn up, on the terms proposed. Subsequently, a clerk of Mr. Lloyd, named Rule, called at the office of Mr. Cox, and there saw the clerk who had attended the summons on behalf of Stephens, and asked for further time to pay the first instalment: Cox's clerk said he would speak to his principal about it; whereupon, Rule, Lloyd's clerk, said: "If you do not give us time, you will have notice of an act of bankruptcy. Burton has committed an act of bankruptcy." To which Cox's clerk replied—"Has he? Perhaps he has committed several." "Yes," rejoined Rule, "he *has* committed several."

Rule, who was called as a witness, admitted that, at the time this conversation took place, he did not know that Burton *had* committed an act of bankruptcy; but only that Cox had *said* so: and he further stated, on cross-examination, that he was, at the time, aware that notices that an act of bankruptcy had been committed by Burton, had been served upon several of the creditors on the 13th of November.

Judgment was signed in the action against Burton on the 26th of November, and execution executed on the 27th. On the 3d of December, the execution-creditor and others had notice of an act of bankruptcy: on the 8th a *fiat* was obtained against Burton; of *which Stephens had notice on the 9th,—on which day the sale took place. [*990]

On the part of the defendant, it was submitted that the execution was protected by the 2 & 3 Vict. c. 29, the creditor not having had notice of any prior act of bankruptcy having been committed, at the time of the levy.

His lordship, however, told the jury that the conversation between the two attorneys' clerks was evidence of notice to Stephens of an act of bankruptcy having been committed by Burton: and the jury thereupon returned a verdict for the plaintiffs.

Shee, Serjt., in Easter term, 1848, obtained a rule nisi for a new trial, on the ground of misdirection, and that the verdict was against evidence. He cited *Taylor v. Willans*, 2 B. & Ad. 845.

Bovill and *Wise* showed cause. The intimation given by Rule, Lloyd's clerk, to Cox's managing clerk, was clearly notice of an act of bankruptcy having been committed by Burton, so as to bind Stephens, the client. It was not necessary that the notice should state the nature or particulars of the act of bankruptcy: a general notice that the party "had committed several acts of bankruptcy," was sufficient: *Udal v. Walton*, 14

M. & W. 254. POLLOCK, C. B., in that case says, "In the case of *Conway v. Null*, 1 Man. Gr. & S. 643, which has been referred to, there was merely a statement of circumstances which in themselves did not amount to an act of bankruptcy; it was not a mere general notice that the party had actually committed an act of bankruptcy. The case of *Hocking v. Acraman*, 12 M. & W. 170, is not at all opposed to this *991] *view of the case. Notice of a docket having been struck merely informs the party that another person has taken a certain step which is adverse to the debtor; the commercial world gather nothing from that fact, except that some person has made a certain affidavit. But here there is a direct notice that acts of bankruptcy have been committed; and such a notice is, on general principles, sufficient to satisfy the act of parliament. There would be great inconvenience in putting any other construction upon it; for, there are twenty different kinds of acts of bankruptcy, and it would be almost impossible to state with accuracy what ought to be the form of notice adapted to each act of bankruptcy. Some light is thrown upon this point by the former statute, of the 43 G. 3, c. 135, s. 3, which makes the issuing of a commission and the striking of a docket notice of an act of bankruptcy. Now, when a docket is struck, the act of bankruptcy is not stated; it is merely stated that the party is a bankrupt: and the commission itself gives no more information on that subject: nor is the specific act of bankruptcy made known until the examination takes place. I think, therefore, on principle, that there has been in this case sufficient notice of an act of bankruptcy." In *Rothwell v. Timbrell*, 1 Dowl. N. S. 778, it was held, that, if an act of bankruptcy has been committed by a trader, by making an assignment of all his property for the benefit of his creditors, and information of that fact is communicated to the attorney of an execution-creditor, previously to the issuing of a *fi. fa.* sued out by such attorney, it is sufficient to invalidate the execution, as against the assignees, notwithstanding the 2 & 3 Vict. c. 29, s. 1, and although the fiat issued after the writ was lodged with the sheriff. COLERIDGE, J., there says: "The words of the statute are, 'provided the person or persons at *992] *whose suit or on whose account such execution shall have issued, had not at the time of executing or levying such execution, notice of any prior act of bankruptcy.' Now, I by no means say, that, in every case, notice to or knowledge of the attorney of a party will satisfy those words: but, in the present case, the notice was given to the attorney in the cause, when he was acting in it as such. He was the same agent as issued the execution, and it should seem issued it at that time in consequence of the information, in order to anticipate the fiat. Under these circumstances, it is impossible, I think, to distinguish between him and his client." A notice to the attorney, then, being sufficient, does not a notice to the clerk who had the management of the cause, stand upon the same footing? [CRESSWELL, J. Have you any authority that

notice to an attorney's clerk, is notice to his principal?] In *Taylor v. Willans*, 2 B. & Ad. 845, in an action for maliciously indicting the plaintiff for perjury, an affidavit made by the plaintiff's attorney's clerk, was put in for the purpose of showing that those who conducted the prosecution had taken means to prevent a person becoming bail for the plaintiff: and it was held to be admissible, without calling the clerk to prove an authority from his master to make an affidavit. "If," said Lord TENTERDEN, "an attorney leaves the conduct of a cause to his clerk, what the latter does therein, binds the party, as much as the act of the attorney himself. The affidavit, therefore, was receivable." [WILDE, C. J. It was part of the proceedings in the cause.] In *Wilmott v. Smith*, M. & M. 238, a tender to a person in the office of the plaintiff's attorney, who was referred to on the subject by a clerk in the office, and refused the tender, as being of an insufficient sum, was held to be a good tender, *without showing who the person was. [WILDE, C. J. Lord TENTERDEN there inferred from the circumstances, that the person referred to had authority to receive the money, and therefore held that a tender to him was good.] The rule respecting privileged communications extends to an attorney's clerk acting on behalf of his master, as well as to the attorney himself: *Taylor v. Forster*, 2 C. & P. 195; *Bowman v. Norton*, 5 C. & P. 177. And, in *Standage v. Creighton*, 5 C. & P. 406, it was held, that, where the clerk of an attorney has the management of a cause, what he says is receivable in evidence, just as if it had been said by the attorney himself. The recent case of *Pike v. Stephens*, 17 Law Journ., N. S., Q. B. 282,—which will probably be relied on for the defendant,—by no means warrants the conclusion which will be sought to be drawn from it. On the contrary, that case shows that a notice to an attorney's clerk who has had the conduct of the cause would be as effectual as a notice to the attorney himself. Besides, in that case, the duty and authority of the attorney, as *dominus litis*, was at an end.

Shee, Serjt., and *Pearson*, in support of the rule. The question is, how far the statute 2 & 3 Vict. c. 29, is to be extended by construction. In *Rothwell v. Timbrell*, it was decided that notice of a prior act of bankruptcy to the attorney of the execution-creditor, is notice to the client. But the principle upon which that case proceeded, is, that the attorney is put in the client's place, and is necessarily intrusted with an almost unlimited control over the proceedings. No case has yet carried it any further. The cases that were cited to show that an attorney's clerk is for *some* purposes identified with the attorney himself, are altogether *inapplicable. An act done by a clerk who has the management of the cause, in the progress of the cause, may well bind the client. That is all that *Taylor v. Willans* decides. *Wilmot v. Smith* raised a totally different question. And with respect to *Taylor v. Forster* and *Bowman v. Norton*, it is to be observed that the privilege

clerk with the duty of repeating it to his master.(a) It appears from Lord DENMAN's notes, that he ruled, at the trial, that the notice was sufficient, as a matter of law. That clearly was going further than is warranted by the authorities. There must, therefore, be a new trial, on the ground of misdirection.

COLTMAN, J. It seems to me to be going quite far enough, to hold that notice of an act of bankruptcy having been committed, given to the attorney of an execution-creditor, is tantamount to notice to the party himself. It has, however, been so decided, and no doubt on good grounds. But it would be going one step further, to hold, that, for the purpose of receiving notice, the managing clerk may be treated as the representative *998] of his employer. Undoubtedly, there are many cases *showing that the convenience of practice requires that the managing clerk should be, in a great degree, looked upon as representing the attorney himself. Therefore, if, in this case, the clerk to whom Rule addressed himself had been shown to be Cox's managing clerk, that would have given rise to the question whether notice to a managing clerk would in all cases suffice. But there was no proof that he was such managing clerk. For these reasons, I think the rule for a new trial should be made absolute.

MAULE, J. I agree with the rest of the court, that no such notice of an act of bankruptcy was given in this case as would defeat Stephens's execution. It seems to have been considered at nisi prius, and ruled as a matter of law, that Cox's clerk was a fit recipient of notice. I agree with my brother COLTMAN that it was some extension of the principle of construction, to hold that notice to *the attorney* was notice to the party. In the present case, all that occurs is this,—a clerk of Burton's attorney goes to Cox's office with an account, and asks for an extension of time for payment of the first instalment under the judge's order; saying to the clerk there, "You had better give us time; for, if you do not, we will give you notice of an act of bankruptcy," and adding that Burton had committed several acts of bankruptcy. I think it is quite clear that Cox's clerk was not a competent person to receive such a notice, and therefore that there ought to be a new trial.

CRESSWELL, J. I also think the learned judge was not right in taking upon himself to determine, as a matter of law, that the notice in this case was sufficient: and upon that ground I concur with the rest of the court in making this rule absolute.

Rule absolute.

(a) Especially as the intimation was, that notice would be given.

**WILD v. HARRIS. June 12.*

[*999]

In assumpsit for breach of promise of marriage, the declaration stated, that, in consideration that the plaintiff, being sole and unmarried, at the request of the defendant had promised the defendant to marry the defendant within a reasonable time, the defendant promised the plaintiff to marry her within a reasonable time; that the plaintiff, confiding in the promise of the defendant, had from thenceforward remained sole and unmarried, and had always, until she had notice that the defendant was married, been ready and willing to marry him; that although a reasonable time had elapsed since the making of the defendant's promise, yet the defendant had not married the plaintiff, but, on the contrary thereof, the defendant, at the time of making his promise, and from thenceforward, had been and still was married, &c.; and that the plaintiff did not know, at the time of the defendant's making his said promise to her, nor for a long time afterwards, that the defendant was married:—

Held, on motion in arrest of judgment, that the declaration disclosed a sufficient consideration for the defendant's promise.

ASSUMPSIT for a breach of promise of marriage.

The declaration stated, that, on, &c., in consideration that the plaintiff, being sole and unmarried, at the request of the defendant, had then promised the defendant to marry him the defendant within a reasonable time, he the defendant then promised the plaintiff to marry her within a reasonable time: Averment, that the plaintiff, confiding in the said promise of the defendant, had always from thenceforward remained and still was sole and unmarried, and had been during all the time last aforesaid, until she had notice that the defendant was married as thereafter mentioned, ready and willing to marry him, the defendant, &c.; that, although a reasonable time had elapsed since the making of the defendant's promise, and before the commencement of the suit, yet the defendant had wholly neglected his promise, and had not married the plaintiff, but, on the contrary thereof, the defendant, at the time of making his promise, and from thenceforward, had been and still was married to a certain woman whose name was to the plaintiff unknown, then and still being the wife of the defendant; and that she, the plaintiff, did not know at the time of the defendant's making his said *promise to her, nor for [*1000 a long time afterwards, that he the defendant was married, &c.

At the trial before MAULE, J., at the sittings in Middlesex, after the last Hilary term, a verdict was found for the plaintiff, damages 10*l*.

Huddleston, in the following term, moved for a rule nisi to arrest the judgment. The declaration discloses no consideration. The plaintiff could not perform her promise,—which is the only consideration alleged for the defendant's promise. [WILDE, C. J. Will not the detriment sustained by the plaintiff form a good consideration?] It is not the consideration alleged. A consideration is insufficient, if its performance be utterly impossible: Chitty on Contracts, 4th edit. p. 57. In *Harvy v. Gibbons*, 2 Lev. 161, the plaintiff declared that he being bailiff to J. S., the defendant, in consideration that he would discharge him of 20*l*. due to J. S., promised to expend 40*l*. in repairing a barge of the plaintiff's: and the court, upon error brought, reversed the judgment for the plaintiff, the consideration being illegal, for, the plaintiff could not discharge

a debt due to his master. So, in *Nerot v. Wallace*, 3 T. R. 17, it was held that a promise made by a friend of the bankrupt, when he was on his last examination, that, in consideration that the assignees and commissioners would forbear to examine him touching certain sums which he was charged with having received and not accounted for, he would pay such sums as the bankrupt had received and not accounted for, was void, as being against the policy of the bankrupt laws. Lord KENYON there says: "I do not say that this is *nudum pactum*: but the ground on which I found my judgment is this, that every person *1001] who, in consideration of some advantage, either to *himself or to another, promises a benefit, must have the power of conferring that benefit up to the extent to which that benefit professes to go; and that not only in fact but in law." And ASHHURST, J., said: "In order to found a consideration for a promise, it is necessary that the party by whom the promise is made, should have the power of carrying it into effect; and secondly, that the thing to be done should, in itself, be legal." Possibly the defendant might have rendered himself liable to an action for deceit, in falsely representing himself to be a single man, when in truth he was married. [WILDE, C. J. How can we say that the performance of the defendant's promise was absolutely impossible? His wife might have died before the lapse of a reasonable time.(a)] The court cannot speculate upon such a possible contingency. In *Caines v. Smith*, 15 M. & W. 189, the declaration, in assumpsit for breach of promise of marriage, stated, that the defendant promised the plaintiff to marry her; that the plaintiff remained and still was sole and unmarried, and, during all the time aforesaid, was ready and willing to marry the defendant, of which he had notice; yet that the defendant disregarded his promise, and wrongfully married another woman. Upon a demurrer to the plea, it was objected to the declaration, that "the averment that the defendant had married another woman, without an allegation of the lapse of a reasonable time for the performance of his agreement with the plaintiff, does not show a breach of the express promise stated in the declaration. The defendant's wife may die before the lapse of a reasonable time, and he may still be able to perform his contract with the plaintiff." But ALDERSON, B., said: "Why should we presume that the wife will die before the lapse of a reasonable time, or in the lifetime of her husband? We ought rather to presume the *continuance of the *1002] present state of things; and, while that continues, it is clear that the defendant is disabled from performing his contract." Here, the promise, being to do an illegal thing, is absolutely void. The defendant's disability to perform his promise did not arise by matter subsequent. In Comyn's Digest,(b) it is said, that, "if a condition be to

(a) *Vide post*, 1004 (a).

(b) *Title Condition* (D. 2): citing 1 Roll. Abr. 240, l. 10 (a misprint for 1 Roll. Abr. 420, l. 10 which refers to Co. Litt. 206 b), translated 5 Vin. Abr. 111, pl. 3.

do a thing which by no means can be done, it shall be said to be an impossible condition; as to go from London to Rome in three hours." "But," continues Comyns, "if the condition be improbable, and out of his power to do, yet it shall not be said to be impossible; as, if the condition be, that a married man shall marry such a woman; for, it is possible that his present wife may die before him and the other woman." (a) For this latter position, Lord Chief Baron COMYNS cites 1 Roll. Abr. 419, l. 45. (b) Rolle cites 40 Ass. 13, (c) which *is no authority [*1003 at all. (d) [CRESWELL, J., referred to Brooke's Abridgment, (e) — "Assise. Feme ssi, et infesse hōe q̄ auoit fem̄, s̄ cōdič q̄ il luy marriera; le fessie infesse A., que enfess B., q̄ infesse C., q̄ infesse D.; le prim̄ fessie deuie; le fem̄ enī s̄ D. xvi. ās ap̄z et lenī bōe, car ceo est admit bō condič, car cōm̄ q̄ le fessie ne puit marry al tēp̄z; del fessēm̄, unč poet estī q̄ sa fem̄ deuiera, et dōq̄z il puit marry le fessieres; et ideo bon condič, et lenī congeable." COLTMAN, J. Is there any authority for the position, that, where the impossibility to perform the promise at the time, is known only to the defendant, he is discharged? No authority to that precise effect has been found. [CRESWELL, J. There is nothing impossible or illegal in the promise. Is the defendant absolved from his engagement, because it turns out by matter subsequent,—the continued life of the wife,—that he cannot perform it? In Comyns's Digest, (g) it is said, that, "if a condition of an obligation be to do a thing *which is *malum in se*, the condition and also the obligation is void: as to

(a) If land be given to the husband of A. and to the wife of B., and the heirs of their bodies, they have presently an estate-tail, by reason of the possibility: Co. Litt. 20 b, 25 b. And see 34 Ass. pl. 1, T. 7 H. 4, fo. 16, pl. 9; Chudleigh's case, 1 Co. Rep. 120.

(b) Title Condition (C.), translated 5 Vin. Abr. 110, pl. 1.

(c) "Un aise fuit port envs ū feme: qui pl' nul tort, et le verdict vient et dit, coment la feme fuit (seisie) de m̄ la terr̄ en sa demen come de fee, et de m̄ la terre enfeoffa ū J. sur cōdition q̄ luy duist prēdi a feme, le q̄l J. aŷ une feme a ceo temps; le q̄l J. enfeoffa oust' ū auī, et il oust'; et issint plusours feoffem̄ts tanq̄ le pl' ore fuit enfeoffe: et trove fuit q̄ celuy qui primei fuit enfeoffe p̄ la condič, fuit mort, et q̄ les feoff. fuer̄ continus issint per xvi ans, et q̄ la feme entra sur cēy q̄ est ore pl'. Et sur ceo ils fuer̄ adjorn̄ a W., ou, p̄ avise de tous les justioi, fuit aq̄ q̄ le pl' ne prist riē p̄ son bfe, eo q̄ la tre fuit tous temps charḡ ove la condič, issint l'enī congeable pur la condič enfreinē, ē q̄ mains la tre fuit." The reporter adds, "*Quere de isto judicio*: car, come semble, lacōdie fuit void, eo q̄ le feoffee av' feme a ceo temps, ut suprā. *Ideo quare*."

(d) The case as stated *supra*, 1002 (b), to have been decided by the advice, i. e. the opinions of all the justices, is a direct authority for the position that an estate made by a woman to a married man, on condition that he shall marry her, is determinable by re-entry on the breach of such condition. And, in abridging this case, Lord Brooke adds that the reason why this was treated as a good condition, was, that, although the feoffee could not marry the feoffress at the time of the feoffment, yet it might be that the wife would die, and then he could marry her. It is true, that, in the Book of Assises, the reporter says, *quere de isto judicio*, because it seems that the condition was void, the feoffee having a wife at the time, and that Lord Rolle consequently adds "but *quere*," to his abridgment of the case. Lord Brooke, however, pays no regard to the doubt expressed by the old reporter.

(e) Title Conditions, pl. 119. This professes to be an abridgment of the case in 40 Ass. 13.

(g) Title Condition (D. 7); citing Sir F. Moore, 477 (Pratt v. Phanner), for that position, and Co. Litt. 266 b, for the position, that an obligation with condition to kill another, is void. In the case in Moore, the condition was, "to accept of, use, and maintain the said Alice as his lawful wife." The defendant pleaded, that, before Alice was married to him, she was married to one Hawle, who is still alive, *per quod ipse de predicta Alicia ut de uxore sua legitima, acceptare, uti, vel manutenere juxta formam conditionis, non potuit*."

maintain and use such a one as his wife, who is the wife of another." That comes very near to the present case. *Cur. adv. vult.*

WILDE, C. J. This was a motion in arrest of judgment. The action was for a breach of promise of marriage; and the declaration stated, that, in consideration that the plaintiff, being sole and unmarried, at the request of the defendant promised to marry her within a reasonable time, the defendant promised the plaintiff to marry her within a reasonable time: it then went on to aver, that the plaintiff remained sole and unmarried, and had always been ready and willing to marry the plaintiff, but that the defendant disregarded his promise, and at the time of making his promise, and from thenceforward, was and continued married, and that the plaintiff was ignorant of the defendant's marriage at the time of the making of his promise. On behalf of the defendant, it has been contended, that, inasmuch as the declaration discloses that the defendant was a married man at the time of the making of the alleged promise,—so that the plaintiff was not bound by her promise to marry the defendant,—there was a total absence of consideration. But the declaration alleges a promise by the plaintiff to marry the defendant within a reasonable time,—which involves within it a promise to remain single for a reasonable time; and this the plaintiff avers that she did do: and that is consideration enough. And the defendant's promise to marry the plaintiff within a reasonable time, was not absolutely impossible of performance; for, his wife might have died within a reasonable time, and so he would have been in a condition to perform his promise *1005] to the plaintiff.(a) The authority referred to by my brother *CRESSWELL in the course of the argument,—from Brooke's Abridgment,—seems to recognise the principle which must govern this case. There, a woman infeoffed a man, upon condition that he (being then a married man) should marry her within a reasonable time. The feoffee infeoffed another person, and he another, and so on. The man died, being still married;(b) whereupon the original feoffor entered as

(a) *Quære*, whether some ambiguity is not involved in the words "within a reasonable time." The plaintiff, when promising to marry the defendant within a reasonable time, must be taken to have so promised with reference to her own free position, and also with reference to the supposed free position of the defendant. A. B., the actual wife, being wholly unknown to the plaintiff, her promise was tantamount to a promise to marry the defendant within a reasonable time, *whether A. B. was alive, or not*. The promise of the defendant to marry the plaintiff within a reasonable time, must either be understood in the same sense as the promise of the plaintiff, in which case the defendant's promise would be, to marry the plaintiff within *the same* reasonable time, whether A. B., his wife, should survive *such* reasonable time, or not; or his promise must be understood as a promise to marry within a reasonable time after the death of A. B. The court appear to adopt the latter construction, under which this difficulty arises,—the two promises are not co-extensive: as if the declaration had alleged a promise to marry the plaintiff on a certain day, if J. S. were then dead, in consideration that the plaintiff, at the defendant's request, promised the defendant to marry him on that day, whether J. S. were alive or not.

(b) No question seems to have been raised in any of the cases, whether such a promise would be void, as being contrary to public policy. *Vide* Gilbert v. Sykes, 16 East, 150. Such an objection would hardly have lain in the mouth of the defendant in the principal case: *Rex v. Wroxtton*, 4 B. & Ad. 641, 1 N. & M. 712. But, in the case reported in 40 Ass. pl. 13, the feoffress *causa matrimonii prælocuti* must be taken to have known the existing disability. It was the case of a woman giving land to a married man upon condition that he will make her his next wife. *Quære*

for condition broken: and it was held that it was a lawful condition; for, that the feoffee's wife might have died within a reasonable time. It would be strange, indeed, to allow the defendant to rely upon his own wrong,—to set up his fraudulent concealment of his marriage,—in order to *discharge himself from his promise; the plaintiff having [*1006 performed her part of the consideration, by remaining unmarried, and ready to marry the defendant, until she discovered that he was already a married man. We therefore think there is no ground for the application. Rule refused.(a)

whether, according to the doctrine laid down in *Gilbert v. Sykes*, it would not be now held that the condition was void, and the estate absolute in the feoffee? And see *Co. Litt. 204*.

(a) *Acc. Milward v. Littlewood*, *Exch. M. T. 1850* (Nov. 6.), decided upon the authority of this case.

SURRIDGE v. ELLIS. May 8.

Upon a motion for a suggestion under the 9 & 10 Vict. c. 95, s. 129, an affidavit by the defendant's attorney, stating the places of residence of the plaintiff and defendant upon information and belief only, is not sufficient.

NEEDHAM, in Easter term last, obtained a rule nisi for a suggestion to deprive the plaintiff of costs, under the 9 & 10 Vict. c. 95, s. 129, on the ground that the verdict,—upon the trial before the secondary of London, in an action upon a bill of exchange,—was for an amount recoverable by plaint in the county-court. The only affidavit produced, was one sworn by the defendant's attorney, in which it was alleged that the deponent "*had been informed and believed*" that the plaintiff in the action dwelt and carried on business at Peckham, in the county of Surrey, and that the defendant in the action dwelt and carried on business at No. 4, Allison's Terrace, Silver Street, in the parish of Kensington, in the county of Middlesex, and that, at the time of the commencement of this action, the plaintiff did not dwell more than twenty miles from the defendant," &c.

Byles, Serjt., on showing cause, objected that the affidavit was insufficient, as it contained no distinct and positive allegation that the plaintiff and defendant dwelt at the places mentioned therein, but a mere statement founded on information and belief.

**Needham*, in support of his rule. The affidavit is sufficient: [*1007 if false, an indictment for perjury could be sustained upon it. It was common in affidavits to hold to bail, made by a clerk or bookkeeper, to allege the existence of the debt in this way.

WILDE, C. J. The affidavit is not sufficient. The only allegation to bring the case within the jurisdiction of the county-court, is given upon anonymous information and belief. It should be positive. In the cases referred to, the affidavit showed the party's means of knowledge. We

cannot receive statements upon information and belief in respect of a matter that is within the knowledge of the defendant himself.

The rest of the court concurring,

Rule discharged.

Needham now renewed his motion, upon an additional affidavit, sworn by *the defendant* himself. (a) He submitted, that, as the merits had not been gone into on the former occasion, he was entitled to move again.

Per curiam. The former rule was discharged on the ground that the affidavit was insufficient to bring the case within the statute. The matter cannot be reargued. If the defendant had at the time asked leave to produce another affidavit, possibly it might have been granted. (b) But, after argument, it is contrary to all practice to allow a second application.

Rule refused. (c)

(a) The affidavit need not be made by the defendant or his attorney, but may be made by any third party. *Walker v. Furnell*, 1 New County-Court Cases, 190.

(b) See *Lloyd v. Gregory*, 2 New County-Court Cases, 343.

(c) See *Tilt v. Dickson*, 4 Man. Gr. & S. 736.

*1008]

*LEE v. LESTER. June 4.

To an action of debt on a bond conditioned for the payment of the interest half-yearly, and the principal sum six months after notice, the defendant pleaded a set-off exceeding the interest due, which set-off accrued before the commencement of the action, but after the interest became payable,—with an allegation that notice to pay the principal had not been given:—Held, that the plea was a good answer to the action, under the 8 G. 2, c. 24, s. 5.

DEBT. The first count was on bond in the penal sum of 300*l.* Plea, —first, as to the first count, that the writing obligatory in that count mentioned, was and is of the tenor, and in the words and figures, following, that is to say, &c. (setting out the bond, dated the 4th of September, 1824); that the said writing obligatory was and is subject to a certain condition thereunder written, and that such condition was and is to the tenor and in the words and figures following, that is to say,—“The condition of the above-written bond or obligation is such, that, if the above-named John Lester, his heirs, executors, or administrators, or any other person or persons on his or their behalf, do and shall well and truly pay, or cause to be paid, unto the said D. Lee, his executors, administrators, or assigns, the sum of 150*l.* of lawful money current in England, with interest for the same, at and after the rate of 4*l. per cent. per annum*, of like lawful money, on the days and times hereinafter mentioned, that is to say, the sum of 3*l.*, for one half-year’s interest thereof, on the 4th day of March and 4th day of September in every year, so long as the said principal sum shall remain due on this security, and the sum of 150*l.* at the expiration of six calendar months next after the said D. Lee, his executors, administrators, or assigns, shall have given to, or left at the

usual place of abode of, the said John Lester, his executors or administrators, notice in writing, and thereby required payment thereof, together with all interest, after the rate aforesaid, as may at the *expiration of such six calendar months remain unpaid; and if [*1009 the said John Lester, his heirs, &c., or any other person or persons as aforesaid, do and shall make all such payments, without any deduction whatsoever thereout, and without fraud or further delay, then the above-written bond or obligation is to be void, or else to remain in full force and virtue," &c.; that the plaintiff or his assigns did not, six calendar months before the commencement of this suit, or at any other time, give to or leave at the usual place of abode of the defendant notice in writing requiring payment of the said sum of 150*l.* in the said condition mentioned, and the said sum of 150*l.* did not become due or payable at any time before or since the commencement of this suit; that, at the time of the commencement of this suit, there was due and owing from the defendant to the plaintiff, upon the said writing obligatory, by the said condition thereof, for the interest in the condition mentioned, a certain sum of money, to wit, the sum of 6*l.* 14*s.* 10*d.*; that the plaintiff before and at the commencement of this suit was, and still remained, indebted to the defendant in a large sum of money, that is to say, the sum of 57*l.* 8*s.* 6*d.*, for work and labour done and performed by the defendant for the plaintiff, at his request, and for money by the defendant paid, laid out, and expended for the plaintiff at his request, and for money found to be due from the plaintiff to the defendant on an account stated between them; which said sum of money so due and owing from the plaintiff to the defendant was wholly unpaid, and equalled the money so due and owing from the defendant by virtue of the said condition of the said writing obligatory, and which said sum of money so due and owing from the plaintiff, or so much thereof as should be necessary in this behalf, he, the defendant, was ready and willing and offered to set off and allow against the said sum of money so *remaining due and pay- [*1010 able by the condition of the said writing obligatory, according to the form of the statute in such case made and provided—verification.

Upon this plea issue was joined. There were other pleas, to which, however, it is not necessary to advert.

The cause was tried before PLATT, B., at the spring assizes at Taunton, in 1848, when a verdict was found for the defendant.

Cockburn, in the following term, obtained a rule nisi to enter judgment for the plaintiff *non obstante veredicto*.

Crowder and *Barstow* now showed cause. No notice having been given to the defendant calling upon him to pay the principal sum, all that was due according to the condition of the bond at the time of the commencement of the action, was, the 6*l.* 14*s.* 10*d.* which had accrued due for interest. The statute 4 Anne, c. 16, s. 12, (a) allows payment after the day.

(a) "Where any action of debt shall be brought upon any single bill, or where action of debt,

[MAULE, J. Does that statute apply to a bond for payment of interest?] It has been expressly so decided, in *Hodgkinson v. Wyatt*, 1 D. & L. *1011] 668. The 8 & 9 W. 3, c. 11, s. 8, clearly *applies to a case of this sort; and, under that statute, it has been held that payment of interest was like the payment of an instalment. The statute 8 G. 2, c. 24, s. 5, was passed for the very purpose of enabling a defendant to do, by plea of set-off, that which might have been done under the statute of Anne. It enacts, "that, by virtue of the said clause in the said first-recited act contained, (a) and thereby made perpetual, mutual debts may be set against each other, either by being pleaded in bar, or given in evidence on the general issue, in the manner therein mentioned, notwithstanding that such debts are deemed in law to be of a different nature; unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty: and, in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same, hath accrued, or shall accrue, by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shown how much is truly and justly due on either side; and, in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid." [MAULE, J. If this motion fails, will there not be judgment for the defendant *quod eat sine die*, and an end of the remedy of the plaintiff for future instalments of interest, or for the penalty?] The plaintiff might have assigned breaches under the statute 8 & 9 W. 3, c. 11, s. 8. [MAULE, J. He was not bound to assign breaches in his declaration.] The defendant clearly could not plead the judgment in this action as a bar to any future action upon the bond. [CRESSWELL, J. This very point seems to have *1012] *been decided, after great argument, in *Collins v. Collins*, 2 Burr. 820. Lord MANSFIELD, speaking of the statute 8 & 9 W. 3, c. 11, s. 8, there says: "Before this statute, the *actual payment* of money in discharge of the demand, was exactly upon the same footing as the set-off of a debt is now put upon: and a plea of *payment* of a sum of money sufficient to discharge the whole demand, was just the same then as a set-off of a debt large enough to balance the whole demand is

or *scire facias*, shall be brought upon any judgment, if the defendant hath paid the money due upon such bill or judgment, such payment shall and may be pleaded in bar of such action or suit; and, where an action of debt is brought upon any bond which hath a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors, or administrators, have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the defeasance or condition of such bond, though such payment was not made strictly according to the condition or defeasance, yet it shall and may, nevertheless, be pleaded in bar of such action, and shall be as effectual a bar thereof, as if the money had been paid at the day and place according to the condition or defeasance, and had been so pleaded."

(a) 2 G. 2, c. 22, s. 13.

now; that is to say, it was a full answer to the plaintiff's demand; and he could have no judgment at all against the defendant. But, if it had come out that there had been a failure of payment of any part of the plaintiff's just demand, the plaintiff would have been entitled to take his judgment for the whole penalty (though execution was to be stayed, on payment of damages already incurred, and costs): and this judgment for the whole penalty was to stand as a security, to answer future breaches. But the payment here intended was to be an *actual* payment: for, stoppage, or setting off of debt against debt, was not then equivalent to actual payment; but cross-actions must at that time have been brought for the respective mutual debts. Since these two very beneficial acts of 2 G. 2, c. 22, and 8 G. 2, c. 24, stoppage or setting off of mutual debts, is become equivalent to actual payment: and a balance shall be struck, as in equity and justice it ought to be. At common law, before these acts, if the plaintiff was as much, or even more, indebted to the defendant, than the defendant was indebted to him, yet the defendant had no method to strike a balance: he could only go into a court of equity, for doing what is most clearly just and right to be done. The 2 G. 2, c. 22, was made to answer this just and reasonable end; and enacts generally, "that, where there are mutual debts between [*1013 the parties, one debt may be set against the other." Upon which act of 2 G. 2, doubts about the different natures of debts have arisen, the 8 G. 2, c. 24, was thereupon made; the 5th section whereof is a general provision, *without exception*."] That is precisely applicable. [MAULE, J. The statute 8 G. 2, c. 24, seems to be the statute of Anne, and something more.] In *Bell v. Shaw*, Holt, N. P. C. 293, where, to debt on bond, the defendant pleaded that 1100*l.* was due, and no more, and undertook to discharge himself therefrom by a set-off, and the plaintiff replied, generally, that a larger sum was due, *to wit*, the sum of 1750*l.*,—it was held that the plaintiff was bound to prove that more than 1100*l.* was due. There, upon proof of the set-off, the plaintiff was nonsuited. Whether the result be a nonsuit, or a verdict followed by a judgment, is quite immaterial. Upon the plain language of the statute of set-off, the defendant is entitled to judgment.

Cockburn and *Phinn*, in support of the rule. What is the true construction of the contract between these parties? It is, that, if the principal sum of 150*l.* be not paid at the expiration of six calendar months after notice, the bond is forfeited; and that, if the interest be not duly paid, the bond is in like manner forfeited. If that be so, the arguments urged and the cases cited on the other side, are altogether inapplicable. In *The Skinners' Company v. Jones*, 3 N. C. 481, 4 Scott, 271, a bond executed by the defendant as surety for J., on the 1st of March, 1832, was conditioned for payment of 5*l.* interest on a principal sum of 200*l.* on the 1st of March, 1833, 5*l.* on the 1st of March, 1834, and 205*l.* on the 1st of March, 1835. The first year's interest was not

*1014] paid till March 30, 1833. In June, 1833, the defendant *be-
 came bankrupt: and it was held that the bond had been forfeited, and was therefore provable under the defendant's commission. So, in *Ashbee v. Pidduck*, 1 M. & W. 564, Tyrwh. & Gr. 1016, to debt on a bond for 2800*l.*, the defendant,—cravingoyer of the condition (which was for securing the repayment of 1400*l.* and interest),—as to 800*l.*, parcel of the sum of 1400*l.* in the condition mentioned, pleaded, that, after the day named in the condition, he paid the sum of 800*l.*, parcel of the said sum of 1400*l.*: and the plea was held bad on special demurrer. Lord ABINGER, C. B., there says: “The bond became forfeited by the non-payment of the money at the day named in the condition. Then, the statute of Anne gives the plea of *solvit post diem*, but it does not authorize such a plea as the present.” And in *Tighe v. Crafter*, 2 Taunt. 387, it was decided, that, if default be made in payment of the interest on a bond, the principal whereof is not yet due, the court will not stay proceedings on payment of the interest and costs; though, it seems, they would restrain the execution to the interest and costs. The like was held in *Masfen v. Touchet*, 2 Sir W. Blac. 706, and *Van Sandau v. —*, 1 B. & Ald. 214. [MAULE, J. It cannot be denied that the bond is forfeited by non-payment.] The bond was forfeited, and the plaintiff became entitled to judgment for the penalty, upon the defendant's failure in payment of the interest,—subject to the equitable jurisdiction of the court. [MAULE, J. What equitable jurisdiction has the court? If it rests on the statute of William, it is no longer an equitable jurisdiction.] It arises on the 4 & 5 Ann. c. 16. [MAULE, J. It can hardly be said, that, where the statute 8 G. 2, c. 24, applies, the circumstance of the bond's having become forfeited, can affect the
 *1015] right of set-off.] What is the plaintiff's demand? *All that is due upon the bond, principal and interest. [MAULE, J. No. The principal sum was not payable until after six months' notice.] The bond is forfeited, and all the consequences are to follow, if the interest is unpaid at the times specified. [COLTMAN, J. In effect, you say that the case is not within the statute 8 & 9 W. 3, c. 11, s. 8. MAULE, J. Nor within the 8 G. 2, c. 24, s. 5.] The plaintiff had a vested right to recover the penalty before the set-off arose. [MAULE, J. The plea of set-off never applies itself to the time at which the debt became due: if the set-off applies at all, it is because there are mutual debts at the time of the commencement of the action. It is essential to your argument, to show that *Collins v. Collins* is not good law.] The question now raised was not discussed there. Would it be any answer to a penalty due on the 1st of January, to say that the defendant has a set-off accruing on the 1st of February? [MAULE, J. At common law, certainly not: but, under the 8 G. 2, c. 24, it is: the plaintiff is only to recover what is fairly and justly due. No doubt, here, if the interest had been paid, under the statute of Anne, after the day, and the obligee

had accepted it, that would have been a good bar. According to the case of *Collins v. Collins*, the existence of the set-off is, since the 8 G. 2, c. 24, a good bar. It follows, therefore, that the plaintiff has brought his action too soon. When the six months' notice has expired, he may bring another action, to which, I think, the judgment in this action would be no answer. *Collins v. Collins* seems to be a very distinct authority.]

COLTMAN, J.(a) I am of opinion that this rule should be discharged. This is a motion to stay the judgment. To entitle himself to that, the plaintiff is *bound to make out a very clear case. The argu- [*1016
ment we have heard has not, to my mind, successfully distin-
guished this case from that of *Collins v. Collins*. If that case was rightly decided, it follows that this rule cannot prevail: and I can see no reason to dissent from the conclusion to which the court there came. The words of the statute of set-off (b) are, that, "in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same, hath accrued, or shall accrue, by reason of any such penalty,(c) the debt intended to be set off shall be pleaded in bar; in which plea shall be shown how much is truly and justly due on either side; and, in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other, as aforesaid." It appears to me that the amount which is to be considered as truly and justly due in this case, is that which should have been paid in the usual course, viz. the interest, and not the 150*l.*, which is only to be paid on a contingency.

MAULE, J. I also think that this rule should be discharged. This is an action on a bond. The plea, setting out the condition, which was for the payment of interest, at 4 *per cent. per annum*, upon 150*l.*, half yearly, and for the payment of the 150*l.* at the expiration of six calendar months after notice, stated that the principal sum had not become due; and, with regard to the interest, it shows that 6*l.* 14*s.* 10*d.* only was due at the time of the commencement of the action, and relies on a set-off to a larger amount due to the *defendant from the obligee. The statute [*1017
under which this plea is pleaded,—the 8 G. 2, c. 24,—enables a
defendant to plead a set-off in bar to an action on a bond or specialty, where the amount of the set-off exceeds the sum justly due upon the bond. A distinction has been sought to be made in this case between a set-off existing at the time the liability on the bond accrued, and one arising at a subsequent period. But I think there is no foundation in law for that distinction: it is just as much a bar, whether it accrued at the one time or the other. Before the statute of set-off, one demand could not be set against another; but the defendant was obliged to reso-

(a) WILDE, C. J., was not present at the argument.

(b) 8 G. 2, c. 24, s. 5.

(c) A penalty contained in any bond or specialty.

to a cross-action. The statute gives force and effect to the set-off, provided it has all the requisites of a legal debt at the time of the commencement of the action. Supposing, then, the statute of set-off to apply to this case, is the debt in question the proper subject of a set-off? That a set-off may be pleaded against the sum accrued due according to the condition of the bond, was decided by the court of King's Bench, on argument, in the case of *Collins v. Collins*: and no substantial argument has been urged against the propriety of that decision. It follows from that case, that, if, at the expiration of a six months' notice, the principal sum remains unpaid, the plaintiff may, notwithstanding the verdict and judgment upon this occasion, maintain an action for it. I think the plea is clearly a good one, and that the plaintiff is barred of this action.

It is to be observed that this case comes before the court upon a motion for judgment *non obstante veredicto*. The plaintiff having had an opportunity of demurring to the plea, and having chosen not to do so, but having treated the plea as one the facts of which were fit and proper to be ascertained before a jury, could only be entitled to relief in this form, in case the court could see *clearly* that the plea was a bad plea. For *1018] the reasons *already given, I think the plea is clearly *not* a bad plea. It is, of course, open to the plaintiff to bring a writ of error, if so advised.

CRESSWELL, J. Having only heard a portion of the argument in support of the rule, I abstain from saying more than this,—that I see no reason for dissenting from the opinions expressed by my brothers COLT MAN and MAULE.

Rule discharged.

H. S. MATHEWS v. PETER MATHEWS. June 7.

In case, in the nature of waste, by a reversioner against a tenant for life, for cutting down timber, &c., a count alleged, that, by the custom of the country where the lands were situate, beech trees were reckoned timber trees. A judge at chambers having allowed, amongst others, in addition to not guilty, a plea traversing the above allegation,—the court declined to rescind his order.

CASE, in the nature of waste, by a reversioner in fee, against the tenant for life, for felling timber and grubbing up hedges.

The first count of the declaration stated, that, before the committing of the grievances by the defendant thereafter next mentioned, and before the commencement of this suit, to wit, on the 1st of April, 1847, Thomas Mathews, of, &c., clerk, was seised, in his demesne as of fee, of and in certain lands, tenements, and hereditaments, consisting of divers, to wit, 100 acres of woodland, 100 acres of pasture land, and 100 acres of other land, situate, &c., upon which said land there was then, and thence continually had been until the committing of the grievances by the defendant thereafter mentioned, divers, to wit, 10,000 timber trees, and divers, to wit, 10,000 trees likely to become timber, and also divers, to wit, 1000

perches of hedges; that Thomas Mathews, being so seised, after the 1st of January, 1838, duly made and published his last will and testament in writing, bearing date the 1st of April, 1847, and thereby, amongst other things, gave and devised the said lands hereinbefore mentioned, unto the *defendant, for life, and, after the death of the defendant, then [*1019 unto the plaintiff, to hold the same unto the plaintiff, and his heirs, for ever; that Thomas Mathews died so seised on the 12th of April, 1847, without altering or revoking his said will as to his said devise of his said lands; that the defendant afterwards, to wit, on the day and year last aforesaid, entered into and upon the said lands, with the appurtenances, whereupon and whereby the defendant, then, to wit, on the day and year last aforesaid, became and was, and still continued, seised, in his demesne as of freehold, of and in the said lands, for the life of him the defendant; that thereupon and thereby the plaintiff, then, to wit, on the day and year last aforesaid, became and was, and continued, seised, in his demesne (*sic*) as a fee, of and in the said reversion of the said lands: yet that the defendant, well knowing the premises, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff in his said reversionary estate and interest of and in the said lands, whilst the plaintiff so remained and was seised of his said reversionary estate and interest of and in the said lands as aforesaid, and before the commencement of this suit, and after the death of the said Thomas Mathews, and whilst the defendant was so possessed as aforesaid of the said lands so devised by the said Thomas Mathews, as aforesaid, to wit, on the 1st of May, 1847, and on divers other days and times between that day and the commencement of this suit, wrongfully and unjustly rooted up, pulled up, felled, cut down, prostrated, and destroyed, divers, to wit, 10,000 oak trees, 10,000 elm trees, 10,000 ash trees, and 10,000 other trees, the same being timber trees there upon the said lands standing, growing, and being, and also divers, to wit, 6000 saplings likely to become timber, and 10,000 standards likely to become timber, that is to say, 2000 saplings of oak trees, 2000 saplings of ash trees, 2000 *saplings of elm trees, there then also stand- [*1020 ing, growing, and being at the said times respectively in and upon the said lands, of great value, to wit, of the value of 2000*l.*, and then also wrongfully and unjustly lopped, topped, shrouded, and barked, and excised, and caused and procured to be lopped, &c., divers other maiden trees, the same then being timber trees, that is to say, 100 oak trees, 100 ash trees, 100 elm trees, and 100 other trees, there then standing, growing, and being in and upon the said lands, and of great value, to wit, of the value of 1000*l.*, and took and carried away the wood and the bark thereof, and then wrongfully rooted up, stubbed up, grubbed up, and destroyed divers, to wit, 100 quicksets of white thorn there then growing and being in and upon the said lands, of great value, to wit, of the value of 500*l.*, then forming certain hedges and fences, then

being in and upon the said lands,—whereby the plaintiff, during all the time aforesaid, had been and still was greatly injured, prejudiced, and aggrieved in his said reversionary estate and interest of and in the said lands.

The second count stated, that, before, &c., and whilst the defendant was and continued so seised, &c., as in the first count mentioned, and whilst the plaintiff was and continued so seised in his demesne as of fee of and in his said reversion of and in the said lands in the said first count mentioned, as in the said first count mentioned, and before the commencement of this suit, to wit, &c., divers, to wit, 10,000 beech trees were then growing and being in and upon the said lands; that, by the custom of the country in which the said lands were situate, beech trees were reckoned and accounted to be, and were, timber trees: yet that the defendant, well knowing the premises, but wrongfully and unjustly contriving and intending to injure the plaintiff in his said reversionary estate and interest of and in the said lands, afterwards, and *1021] before the commencement of this suit, and whilst *the plaintiff so remained and was seised of his said reversionary estate and interest of and in the said lands as aforesaid, and after the death of the said Thomas Mathews, and whilst the defendant was so possessed of the said lands as aforesaid, and after he had entered into and upon the same as aforesaid, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the commencement of the suit, wrongfully and unjustly felled, cut down, and prostrated, and caused and procured to be felled, cut down, and prostrated, divers, to wit, 5000 of the said beech trees, at the said last-mentioned times respectively then standing, growing, and being in and upon the said lands, of great value, to wit, of the value of 1000*l.*, and then also wrongfully and unjustly lopped, topped, shrouded, and barked, and caused and procured to be lopped, topped, shrouded, and barked, divers others of the said beech trees, to wit, 3000 of the said beech trees, the said last-mentioned beech trees then being maiden trees at the said last-mentioned times respectively then growing and being in and upon the said lands, of great value, to wit, of the value of 1000*l.*, whereby the plaintiff, during all the time last aforesaid, had been and still was greatly injured, aggrieved, and damaged in his said reversionary estate and interest of and in the said lands.

The third count stated, that, before, &c., to wit, on, &c., there were divers trees which were not nor are timber trees, then standing, being, and growing in and upon the said lands so devised as aforesaid, that is to say, 5000 abeles, 5000 poplars, 5000 sycamores, 5000 larches, 5000 firs, 5000 limes, 5000 horse-chestnuts, 5000 walnuts, 5000 birches, 5000 planes, 5000 acacias, 5000 maples, 5000 yews, and 5000 other trees,—which said last-mentioned trees were and are of such a nature, kind, and description, that, when and so soon as the stems or trunks of the same should or might

be cut *through, felled, or divided, the same trees became and [*1022 were and are wholly destroyed and eradicated, and of no further use, benefit, or advantage to the said lard, and the stumps, stocks, and stools of the last-mentioned trees would never, when so cut as aforesaid, grow, spring up again, or produce again their ordinary or usual profit, or any profit or advantage whatever, or any underwood or shoots of any value or benefit from their growth: yet that the defendant, well knowing the premises, but wrongfully and unjustly contriving and intending to injure the plaintiff in his said reversionary estate and interest of and in the said lands, afterwards, and before the commencement of this suit, and whilst the plaintiff so remained and was seised of his said reversionary estate and interest of and in the said lands as aforesaid, and after the death of the said Thomas Mathews, and whilst the defendant was so possessed of the said lands as aforesaid, and after he had entered into and upon the same as aforesaid, to wit, on, &c., &c., wrongfully and unjustly felled, cut down, divided, destroyed, and prostrated, and caused, &c., divers, to wit, 70,000 of the said last-mentioned trees, that is to say, 5000 of the said abeles, &c. &c., at the said last-mentioned times respectively then standing, growing, and being in and upon the said lands, of great value, to wit, of the value of 1000*l.*, and being then of the nature, kind, quality, and description as in this count above mentioned, and thereby then rendered all such trees so cut down as last aforesaid wholly useless, &c.,—whereby, &c.

The fourth count was in trover, for trees, saplings, pollards, and bushes.

The defendant obtained leave to plead,—first, not guilty,—secondly (to the first count), that the said Thomas Mathews did not devise the reversion to the plaintiff and his heirs in manner and form as in the first count alleged,—thirdly (to the second count), that *the plaintiff was not, at the [*1023 said times when, &c., or either of them, seised of the said reversion of and in the said lands in the second count mentioned and referred to, in manner and form, &c.,—fourthly (to the second count), that, by the custom of the country in which the said lands in the second count mentioned and referred to were situate, beech trees were not reckoned or accounted to be, and were not, nor are, timber trees, in manner and form, &c.,—fifthly (to the third count), that the plaintiff was not at the said times when, &c., or either of them, seised in the said reversion of and in the said lands in the third count mentioned and referred to, in manner and form, &c., (a)—sixthly (to the third count), that the said trees in the third count mentioned were not, nor are not, nor was nor is any of them, of the nature, kind, quality, or description in the said third count mentioned, in manner and form, &c.,—seventhly (to the last count), not possessed.

Pearson now moved for a rule nisi to rescind the order (which had been made a rule of court) allowing the defendant to plead the above pleas, on the ground that the fourth plea was a traverse of a matter that was

(a) This plea appears to traverse a mere inference of law.

included in not guilty. [MAULE, J. Can the defendant do more, under not guilty, than show that he did not commit the act complained of? CRESSWELL, J. Was it necessary to allege that beech trees are timber trees?] It would seem so from the authorities: *Phillips v. Smith*, 14 M. & W. 589. In *Sutherland v. Pratt*, 11 M. & W. 296, a declaration in assumpsit on a policy of assurance stated that the plaintiff caused a policy to be effected, &c. ; and a plea, that the policy was *not* caused to be made by or on behalf of the plaintiff, was held bad on special demurrer, as amounting to non assumpsit. In a recent case in this court, (a) *1024] the allegation of a bailment, in detinue, *was* held necessary, but not traversable. [MAULE, J. I thought we held that it was *not* necessary to allege it. COLTMAN, J. If you fail to prove the custom of the country, would the defendant be entitled to a verdict upon not guilty, he having been proved to have cut down the trees?] This sort of plea may very seriously embarrass the plaintiff at the trial. [MAULE, J. It may be demurrable.] The defendant's object evidently is, to invite a demurrer. But the court is in the habit of striking out pleas on the ground that they amount to the general issue. [MAULE, J. Not so; but because there is already another plea upon the record raising the same defence, and thus the 5th rule of Hilary term, 4 W. 4, is violated.] That is a new principle altogether. [CRESSWELL, J. Should you not have gone to a judge at chambers for an order to strike out the objectionable plea?] The case of *The South Eastern Railway Company v. Sprott*, 8 Dowl. P. C. 493, shows that *this* is the proper form of motion.

WILDE, C. J. Not guilty merely puts in issue the wrongful act, the cutting down of the trees.

MAULE, J. In case for diverting a water-course, the wrongful act complained of, is, the diversion; and that alone, and not the title, is put in issue by not guilty. I see no pretence for saying that the plea referred to is one which ought not to have been allowed under the statute of Anne.

The rest of the court concurring,

Rule refused.

(a) The cause alluded to, is, *Clossman v. White*, *ante*, p. 43.

END OF TRINITY TERM.

AN

INDEX

TO THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

Williamson

ACCOMPANIMENT.

See COPYRIGHT.

ACKNOWLEDGMENT.

See HUSBAND AND WIFE.

AFFIDAVIT.

On Motion for a Suggestion—See COUNTY-COURT, II.

And see ARREST, I.

AGENT.

See BROKER.

FACTOR.

PRINCIPAL AND AGENT.

AGREEMENT.

Sufficiency of Consideration.

A. and B. entered into the following agreement:—"In consideration that A., of Macclesfield, surgeon and apothecary, will engage me, the undersigned B., as assistant to him as a surgeon, &c., I, the said B., promise the said A. that I will not at any time practise as surgeon or apothecary at Macclesfield, or within seven miles thereof, under a penalty of 500*l.*: and I, the said A., do hereby agree with the said B., to engage the said B. as an assistant to me as a surgeon, &c., on the terms aforesaid."

In assumpsit by A. against B. for a breach of this agreement, the declaration averred that A. did, in pursuance and performance of the agreement, engage B. as assistant to him A. as a surgeon, &c., according to the terms, true intent, and meaning of the agreement:—

VOL. VII.—79

Held that there was a sufficient consideration for the promise of B., and that the contract was not void as an unreasonable restraint of trade. *Saintier v. Ferguson*, 718

AMENDMENT.

I. *At Nisi Prius, under 3 & 4 W. 4, c. 42, s. 23.*

1. In assumpsit by an endorsee against the drawer of a bill of exchange, the declaration, in the usual form, alleged that the bill was duly presented to the acceptor, that it was dishonoured, and that the defendant had notice thereof. The defendant pleaded,—that the bill was not presented to the acceptor,—and that the defendant had no notice of its dishonour. At the trial, it was proved that the bill was presented, on the day it became due, at the house of the acceptor; and that the defendant, to whom it was there shown, said that the acceptor was dead, and that he was his executor,—adding a request that it might be allowed to stand over for a few days, and he would see it paid.

The judge having permitted the declaration to be amended, by alleging the death of the acceptor, the appointment of the defendant as his executor, the proving of the will, and the presentment of the bill to the defendant for payment:—Held, that the amendment was warranted by the statute. *Cawnt v. Thompson*, 400

2. The statute does not authorize the amendment of the record, upon the trial of an issue of *nul tiel record*. *Cooper v. Pennefather*, 739
And see CONTRACT.

II. *After Argument of Demurrer.*

The court refused to allow a plea to be amended

after judgment pronounced thereon. *Smith v. The London, Brighton, and South Coast Railway Company*, 793

ANNUITY.

Return or Retainer of Part of the Consideration.

- I. To induce the court to set aside a warrant of attorney given to secure an annuity, on the ground of an improper returning or retaining of part of the consideration-money, the fact of such returning or retaining must be distinctly and unequivocally sworn to. *Barber v. Thomas*, 612
2. At the time of executing an annuity deed, the grantor, an attorney, received the full amount of the consideration-money, 170*l.*, and immediately paid thereof 8*l.* 6*s.* 6*d.*, for the costs of preparing the securities and enrolling the memorial, and 20*l.* to the grantor's agent, in satisfaction of a liability to him (the agent) upon a bill of exchange drawn by the grantor upon and accepted by his father, and which was within a week of maturity:—Held, that this was not such a transaction as would warrant the court in setting aside the securities eleven years after the date of the grant. *Ib.*

APPEARANCE.

See PRACTICE, II.

APRYNG, 467.

ARBITRAMENT.

I. Authority to refer.

The attorney on the record has authority to consent to a reference on behalf of his client. *Smith v. Troup*, 757

II. Discretion of Arbitrator.

Where a cause is referred, the arbitrator to be at liberty to state any point of law for the opinion of the court, and he declines to do so, the court will not interfere with his discretion. *Miller v. Shuttleworth*, 105

III. Mistake of Arbitrator, &c.

By an order of reference made by consent, it was stipulated, amongst other things, that certain items in an account annexed to the order should be taken as admitted between the parties. The arbitrator having made his award,—the court refused to amend the order, and refer the matter back, upon affidavits showing a mistake by the clerk of the plaintiff's attorney in the copying of one of the admitted items. *Winn v. Nicholson*, 819

IV. Demand of Money, &c., awarded.

A personal demand of money payable under an award, with a view to a proceeding on a rule

of court under the 1 & 2 Vict. c. 110, s. 18, may be dispensed with, where the party is evidently keeping out of the way to avoid the demand. *Smith v. Troup*, 757

ARGUMENTATIVE TRAVERSE.

See LANDLORD AND TENANT, II.

ARREST.

I. On a Capias under 1 & 2 Vict. c. 110, s. 3.

- Affidavit.*—1. An affidavit of debt alleging several distinct and separate causes of action for separate and distinct sums, some of which are well stated, and others not, is not therefore bad altogether. *Cunliffe v. Maltass*, 695
2. A *capias* issued under a judge's order pursuant to the 1 & 2 Vict. c. 110, s. 3, endorsed for bail for 1050*l.*, upon an affidavit stating distinct causes of action for four several amounts, three of them correctly, and one (for 500*l.*) imperfectly. The defendant, having been arrested, applied to a judge at chambers to discharge him out of custody. The judge declined to discharge the defendant, but made an order reducing the amount to be taken for bail, by the 500*l.* so defectively alleged:—The court refused to rescind the order. *Ib.*

II. Taking out of Court Money deposited in Lieu of Bail.

A defendant arrested on a *capias* under the 1 & 2 Vict. c. 110, deposited with the sheriff the amount endorsed, with 10*l.* for costs, pursuant to the 43 G. 3, c. 46, and shortly afterwards embarked with his family for Australia, without putting in bail above, or leaving any attorney or agent to act for him. The court granted the plaintiff a rule nisi for taking the money out of court, subject to any deduction from the 10*l.*, upon taxation,—which rule was made absolute, upon service by sticking up the rule nisi in the office. *Shackel v. Johnson*, 865

ARREST OF JUDGMENT.

See LIBEL, 1.

REFLEVIN, 3.

ASSIGNMENT.

Of Copyright—*See COPYRIGHT.*

ASSUMPSIT.

Sufficiency of Consideration.

1. B. & C., members of a railway committee, being indebted to A. in a large sum, which A. sought to recover by contributions from the committee, and A. having brought an action against B., and having threatened to sue C., D. promises, that, in consideration that A.

will cease to prosecute the action brought, and will forbear to sue C., he, D., will pay a certain smaller sum to A. In declaring upon this promise, it is not necessary to allege that D. was a member of the committee, or that A. had a well-founded claim against the committee, or that the actions brought and threatened related to the committee, or that the plaintiff was ready and willing to accept the smaller sum in satisfaction of the debt owing from B. and C. *Temple v. Knowles*, 651

2. A declaration, in assumpsit, stated that the plaintiffs had commenced an action against A. to recover a sum due to them from A., and another action against B., as a party liable in respect of the same debt; that, in consideration that the plaintiffs would consent to stay the proceedings in the action against A. until a given day, and would proceed to trial with the action against B. at a certain sitting, or as soon after as the practice of the court would admit of,—the defendant promised that he would indemnify the plaintiffs against all costs and expenses connected with the action against B., *whether the same should be decided in favour of the plaintiffs or of B.*, and that he, the defendant, would pay the same costs and expenses when requested by the plaintiffs. The declaration then averred that the plaintiffs, confiding in the promise of the defendant, did consent to stay, and did stay, the proceedings in the action against A., and that they duly proceeded to trial with the action against B., and obtained a verdict therein; that the verdict was afterwards set aside, and a new trial ordered, upon payment of costs by B.; that the plaintiffs again set down the cause for trial; that, by the direction and at the request of the defendant, the record was withdrawn; and that the plaintiffs had incurred, and paid, certain costs and expenses in connexion with the said action: and assigned for breach, the defendant's refusal to reimburse them:—Held, that the declaration disclosed a good cause of action, the final determination of the action against B. not being a condition precedent to the plaintiffs' right to sue for the costs, and the consideration being satisfied by the plaintiffs' staying proceedings against A., and going to trial against B. *Wilson v. Bevan*, 673

ASSURANCE.

See INSURANCE.

ATTACHMENT.

- I. For Non-Delivery of Bill—See ATTORNEY, II., 5.

II. For Disobedience of Rule of Court.

1. Attachment will not lie on a rule of court, unless for disobedience of some express direction. *Doe v. Earl of Cardigan v. Bywater*, 794

2. An order was made *by consent*, in an action of ejectment, "that the proceedings be stayed, the defendant to pay his own costs of a former ejectment, and the lessor of the plaintiff to pay 5*l.* towards the defendant's costs, and to grant a lease of the premises for 21 years, at the rent of 1*l.* a year, on the same conditions as other parts of the estates of the lessor of the plaintiff in the parish, were held." The defendant having declined to accept a lease and execute a counterpart,—the court refused to grant an attachment against him. *Id.*

ATTORNEY.

I. Authority of.

The attorney on the record has authority to consent to a reference on behalf of his client. *Smith v. Troup*, 757

II. Bill of Costs.

Form of. Name of the Court and Cause.—1. An attorney's bill, to be in strict compliance with the statute 6 & 7 Vict. c. 73, s. 37, must contain, in express terms, or by reasonable inference, a statement of the name of every cause and of every court in which any part of the business charged for has been transacted. *Sargent v. Gannon*, 742

2. A bill of costs headed "Yourself v. Round" (the client's name being Gannon), and endorsed "Hancock v. Round," was enclosed in a signed letter addressed to Gannon, beginning "Hancocks v. Round,—I send you my bill in this matter." All the business comprised in the bill had reference to a purchase of land under a decree of the court of Chancery in a cause of "Hancock v. Round."—Held, that the name of the cause sufficiently appeared. *Id.*

3. The bill was not headed in any court: but the whole related to one transaction, and some of the items were for attendances at the accountant-general's and at the master's offices, and in court upon a petition to the Vice-Chancellor:—Held, that the bill gave reasonable information to the client as to the course to be pursued in order to tax the bill, and therefore that the statute was complied with. *Id.*

Plea of Non-Delivery of.—4. Assumpsit against several defendants for work and labour by the plaintiff as an attorney, with counts for money paid, &c. Plea,—by one of the defendants,—to the whole declaration, that the action was commenced, after the 6 & 7 Vict. c. 73, for the recovery of fees, charges, and disbursements due to the plaintiff as an attorney, as in the first count mentioned, and that no signed bill had been delivered to the defendant, or sent by the post to, or left for him at, his counting-house, office of business,

dwelling-house, or last known place of abode:—Held, on special demurrer, that the word "disbursements" applied to the count for money paid; and that the plea sufficiently negated the delivery of a bill of costs within the terms of the statute. *Tate v. Hitchings*, 875

Attachment for Non-delivery of.]—5. By a judge's order (made a rule of court), A., the former attorney of B., was directed within ten days to deliver to C. & D., B.'s present attorneys, a bill of costs, &c.:—Held, that an attachment could not issue against A. for disobedience of the rule of court, upon a mere demand by a clerk of C. & D. *In re Catlin*, 136

III. Collusive Settlement between the Parties.

The court will not interfere, even in the case of a plaintiff suing *in forma pauperis*, to prevent effect being given to a settlement between the parties,—although it be evident that the attorney will lose his costs,—unless the settlement be clearly collusive. *Francis v. Webb*, 731

AWARD.

See ARBITRAMENT.

BAGUNKILLS, 471 (a).

BAIL.

See ARREST, I.

BAILMENT.

See DETINUE.

BANKRUPT.

I. Act of Bankruptcy.

Notice.]—1. An intimation given by a clerk of a defendant's attorney, to a clerk of the plaintiff's attorney, that the defendant has committed an act of bankruptcy,—the clerk to whom it is given not being shown to be a managing clerk, or to have communicated the matter to his principal,—is not such a notice as will defeat an execution, under the proviso in the 2 & 3 Vict. c. 29, s. 1. *Pennell v. Stephens*, 987

2. *Quere*, whether a notice to one who is shown to be a managing clerk would suffice? *Ib.*

II. Messenger's Fees.

In an action by a messenger of the court of bankruptcy, against J. S., for fees due from him as petitioning-creditor under a *fiat*,—Held, that the plaintiff proved a *prima facie* case, by putting in the proceedings under the *fiat*, without showing the identity of the defendant with the J. S.—named therein as the petitioning-creditor. *Hamber v. Roberts*, 861

III. Execution on Warrant of Attorney.

A. gave B. a warrant of attorney, under which judgment was entered up. On the 24th of August, 1840, a *fi. fa.* issued, under which the sheriff, on the 26th, seized A.'s goods, consisting of machinery, iron, &c. On the third of September, A. committed an act of bankruptcy. On the 8th and 9th of September, the sheriff sold part of the goods by auction, in lots, and received a deposit on each lot, but the lots were not separated from the mass. On the 11th of September, a *fiat* in bankruptcy was granted against A. On the 19th of September, and following days, the goods were weighed out and delivered to the purchasers. The sheriff subsequently paid over the whole of the proceeds of the sale to B.:—Held, that the assignees of A. were entitled to recover the whole of the proceeds, including the deposits, inasmuch as there had been no perfect sale, but only an inchoate sale, at the time of the *fiat*, and B. still remained a creditor of A. having security, within the provisions of the 108th section of the 6 G. 4, c. 16. *Ward v. Dalton*, 643

BARON AND FEME.

See HUSBAND AND WIFE.

BILL OF EXCHANGE.

I. Description of Parties.

In a count upon a bill of exchange, by endorsee against acceptor, the defendant was described as "John M. Knott":—Held, an insufficient description, and properly taken advantage of by demurrer. *Kinnersley v. Knott*, 980

II. Alteration of.

A bill at three months, drawn by A. and accepted by B., for A.'s accommodation, was endorsed and sent by post by A. to C. for value. C. returned the bill, insisting upon having one at two months instead. A. thereupon altered the bill, by making it payable at two instead of three months, and again sent it to C. There was no evidence that B. knew of the alteration at the time; but there was evidence to show that he subsequently assented to its being treated as a two months' bill:—Held, that the bill was well declared on as a two months' bill, and that it was not avoided by the alteration. *Tarleton v. Shingler*, 812

III. Notice of Dishonour.

1. Knowledge of the probability, however strong, that a bill of exchange will be dishonoured, cannot operate as a notice of dishonour, or dispense with it. But knowledge that the bill has been dishonoured, where the drawer is himself the party who is to pay the bill (as

executor of the acceptor), does amount to notice. *Caunt v. Thompson*, 400

2. In assumpsit by an endorsee against the drawer of a bill of exchange, the declaration, in the usual form, alleged that the bill was duly presented to the acceptor, that it was dishonoured, and that the defendant had notice thereof. The defendant pleaded,—that the bill was not presented to the acceptor,—and that the defendant had no notice of its dishonour. At the trial, it was proved that the bill was presented, on the day it became due, at the house of the acceptor; and that the defendant, to whom it was there shown, said that the acceptor was dead, and that he was his executor,—adding a request that it might be allowed to stand over for a few days, and he would see it paid:—Held, that there was sufficient evidence of notice of dishonour to the defendant. *Id.*

And see AMENDMENT.

BIRTH.

Evidence of period of, 487.

BOND.

Plea of Set-off, under 8 G. 2, c. 24, s. 5.

To an action of debt on a bond conditioned for the payment of the interest half-yearly, and the principal sum six months after notice (which notice had not been given), the defendant pleaded a set-off exceeding the interest due, which set-off accrued before the commencement of the action, but after the interest became payable:—Held, that the plea was a good answer to the action, under the 8 G. 2, c. 24, s. 5. *Lee v. Lester*, 1008

BONDLAND, 468 (g).

BROKER.

Authority of.

1. One who employs a broker to buy railway shares for him, impliedly authorizes him to do all that is needful to complete the bargain. *Bayley v. Wilkins*, 886
2. A. employed B., a broker and member of the Stock-Exchange, to buy shares for him. At the time of the purchase, a call had been made, but was not yet payable. The seller having paid the call, in order to enable her to make a transfer of the shares, B., who by the rules of the Stock-Exchange, was personally responsible for it, paid the money:—Held, that B. was entitled to recover from A. the sum so paid, as money paid to his use. *Id.*

BROKER'S BOOK.

See PRACTICE, XL 1, 2.

CAPIAS.

Under 1 & 2 Vict. c. 110, s. 3.

See ARREST.

CARRIER.

See RAILWAY COMPANY, I.

CHARTERED COMPANY.

See JOINT-STOCK-COMPANY.

CHARTER-PARTY.

See TROVER, I, 2.

CHRISTIAN NAME.

Statement of, in pleading.

Where, in describing a party in pleading, a single letter is prefixed to his surname, the court will intend it to be his full christian name, if a vowel; otherwise, if a consonant. *Kinnervell v. Knott*, 989

CLERK.

See BANKRUPT, I.

COLLIERY.

*See ECCLESIASTICAL LEASE.
MINES.*

COLLUSION.

See ATTORNEY, II.

COMMON CARRIER.

See RAILWAY COMPANY, I.

COMPENSATION.

See RAILWAY COMPANY, II.

CONDITION.

Of Re-entry, in a Lease.

Where land is demised subject to a condition for re-entry on default in payment of the rent, the right of re-entry does not accrue until the rent has been duly demanded. *Hill v. Kempshall*, 975

CONDITION PRECEDENT.

See ASSUMPSIT, 2.

CONTRACT.

Of sale, Construction of.

1. In assumpsit by the sellers against the buyers for the breach of two contracts for the shipment at a foreign port, of two several quantities of rye-meal, the declaration stated, that, "after the making of the said contracts, and before the performance of them, or of any part thereof, it was agreed between the plaintiffs and the defendants that the said two con-

tracts should be deemed and taken to be, and to operate as, one contract, and should be performed as if the same had been one contract for the amount of the said two quantities of meal:—Held, that this allegation was not sustained by proof that the buyers had sent out *three vessels* to receive the meal, the first of which was not of capacity sufficient to take on board the quantity mentioned in the first contract, and that they had received a separate bill of lading of the cargo brought home by that vessel, and accepted a bill drawn on them for the stipulated proportion of that particular cargo. *Meniaeff v. Reade*, 139

2. The judge at the trial having refused to allow the declaration to be amended, by striking out the words "or of any part thereof,"—the court, to whom the propriety of that refusal was referred, declined to interfere. *Id.*
3. By two contracts, entered into at different times, the defendants engaged to ship at Cronstadt, for the plaintiffs, 250 tons and 350 tons respectively of rye-meal,—each contract stipulating that the shipment should be made at the first open water, allowing a fair and reasonable time for the arrival out of the vessel and getting the goods down to Cronstadt; that payment should be made one-third at three months from the date of bill of lading; but that, should the vessel not arrive in time for the goods to be shipped before the 30th of June, or the sellers not be able to procure a ship by that date, the sellers should draw for the remainder as specified above. In an action by the buyer against the sellers for the breach of these two contracts, the defendants pleaded amongst other pleas, that the plaintiffs were not, at and after the arrival of the said vessels at Cronstadt, and from thence at and until a fair and reasonable time had elapsed for getting the goods down to Cronstadt, ready and willing to buy and accept and pay for the meal, in manner and form as alleged; and that the plaintiffs had not performed the said contracts and promises in all things on their part to be performed, in manner and form as alleged:—Held, that the circumstance of the buyers' having sent out *three vessels*, neither of which was of capacity sufficient to take on board the quantity mentioned in either contract, and which arrived at the port of loading at different times, did not entitle the defendants to a verdict upon these two issues; but that the buyers were entitled to maintain an action against the sellers, although they had not sent out *one vessel* to receive the quantity mentioned in each contract. *Reade v. Meniaeff*, 152

CONVERSION.

See TROVER, II.

CONVEYANCE.

By Married Woman—See HUSBAND AND WIFE.

COPITIS, 467.

COPYRIGHT.

In Musical Compositions.

1. *Description of Copyright claimed.*—One who adapts words to an old air, and procures a friend to compose an accompaniment thereto, acquires a copyright in both words and accompaniment; and his assignee, in declaring for an infringement, may describe himself as proprietor of the copyright in the whole composition. *Leader v. Purday*, 4
2. *Notice of Objections.*—In an action by A., for the infringement of copyright in a musical composition, consisting of an "air," which was old and not the subject of copyright, of "words," which were written by B., and of an "accompaniment," which was composed by C. at the request and for the benefit of B.:—Held, that it was not competent to the defendant,—under a notice of objections stating merely that A. was not the owner of the copyright, and that there was no subsisting copyright in the work,—to object at the trial that there had been no assignment by C., even though the point arose upon the evidence produced on the part of the plaintiff. *Id.*
3. *Assignment of Copyright.*—A., the author of a musical composition, in October, 1844, agreed in writing, not under seal, with B., for the sale of the copyright therein to him, undertaking to execute, when called upon, a proper assignment to B., his executors, &c., or as he or they should direct:—Held, that this did not operate as an assignment to B., so as to render inoperative a subsequent regular assignment by A. to B. and C. *Id.*

CORRODY.

Charged upon Leicester Abbey, petition of right to be relieved from, 461, n.
What shall amount to, 461, n.

COSTS.

I. Bill of—See ATTORNEY, II.

II. Security for Costs—See INTERPLEADER, 2.

III. Where Money paid into Court.

Payment of money into court generally upon the whole declaration does not disentitle the defendant to the general costs of the cause, where he afterwards obtains judgment as in case of a nonsuit. *M'Lean v. Phillips*, 817

IV. Costs of the Day.

A plaintiff is not entitled to move for costs of

the day, unless he is present when the cause is called on. *Newton v. Chaplin*, 774

And see COUNTY-COURT, II., IV.

COUNTY-COURT

I. Jurisdiction.

1. One who resides in Scotland, and carries on business in London by means of an agent, is not bound to sue in the city small debts court established under the 10 & 11 Vict. c. lxxi., for a debt not exceeding 20*l*. *Sheila v. Rait*, 116
2. A plea of not possessed, to an action of trespass *quare clausum fregit*, takes the case out of the jurisdiction of the new county-courts. *Timothy v. Farmer*, 814

II. Suggestion, to deprive Plaintiff of Costs.

1. To entitle a defendant to enter a suggestion to deprive the plaintiff of costs, under the county-courts act, 9 & 10 Vict. c. 95, the affidavit must in positive terms state that the defendant was resident within the local jurisdiction, and must negative the parties' respectively being officers of the county-court, at the time of the commencement of the action. *Dodd v. Wigley*, 106
2. *Quære*, whether a case is brought within the second exception of the 129th section, where part of the cause of action arose (*i. e.* where some of the goods were delivered, or a portion of the work done) within the jurisdiction of the court "within which the defendant dwells or carries on his business at the time of the action brought?" *Ib.*
3. The affidavit to found a motion for a suggestion to deprive a plaintiff of costs under the county-courts act, 9 & 10 Vict. c. 95, s. 129, must allege *with certainty and precision* that the plaintiff did not, at the time of the commencement of the action, dwell more than twenty miles from the defendant. *Johnson v. Ward*, 868
4. Upon a motion for a suggestion under the 9 & 10 Vict. c. 95, s. 129, an affidavit by the defendant's attorney, stating the places of residence of the plaintiff and defendant upon information and belief only, is insufficient. *SurrIDGE v. Ellis*, 1006
5. And the court will not allow a second application upon amended materials. *Ib.* 1007

III. Demand reduced by Set-off.

1. A defendant is not entitled to enter a suggestion to deprive a plaintiff of costs, under the 129th section of the county-courts act, 9 & 10 Vict. c. 95, where the debt or demand, originally exceeding 20*l*., is reduced below that sum by a claim of set-off. *Woodhams v. Newman*, 654

2. The words "on balance of account or otherwise," in s. 58, have reference to a debt reduced by payments, or a balance settled and ascertained before action brought. *Ib.*
3. A demand exceeding 20*l*., and reduced by set-off to a sum not exceeding 20*l*., is not within the jurisdiction of the county-courts created by 9 & 10 Vict. c. 95. *Berwick v. Copper*, 669

IV. Costs on Verdict under 5*l*., in Tort.

Where, in an action of tort, the plaintiff obtains a verdict for less than 5*l*. under a writ of inquiry, he is entitled to his costs, although the sheriff has no power to certify, and although the action might have been brought in one of the new county-courts: *dissentiente*, *CRESSWELL, J. Reed v. Shrubsole*, 630

And see REFLEVIN.

COVENANT.

I. Construction of.

1. *Form of.*—No precise form of words is necessary to constitute a covenant: it is enough, if the intention of the parties mutually to contract, is apparent from the general scope of an instrument under seal,—more especially, where it commences with the words "it is hereby agreed by and between the said parties in manner following." *Wood v. The Copper Miners' Co.*, 906

By an instrument under seal, expressed to be made and entered into between the defendants and the plaintiff, it was "agreed by and between the parties," amongst other things—that the defendants should grant a lease of certain premises to the plaintiff, for twelve years, at a pepper-corn rent, for the purpose of the plaintiff's carrying on therein the manufacture of patent-fuel,—that all the coals consumed and used by the plaintiff for the purpose of his manufacture during the term, should be bought and purchased of the defendants, provided the defendants *could and should* supply him with the quantity that should from time to time be required by him, or to such extent as the defendants *could supply*, and that the defendants should charge for the same a given price, and *no more*,—and, further, that the defendants should not be compelled to supply more than 500 tons *per week*, and that, in case the defendants should, from some substantial cause, be unable to supply small coal to the extent agreed upon, they should give the plaintiff six months' notice of such their inability, and in such case the plaintiff should be at liberty to obtain his supply of coal, or the excess beyond the quantity the defendants could supply, from any other source:—Held, that this instrument wa.

properly declared upon as a covenant on the part of the defendants to supply the plaintiff with coal to the extent of 500 tons weekly, unless unable from some substantial cause.

Wood v. The Copper Miners' Co., 906

2. *Mining Lease.*—A., the lessee of certain coal-mines, for a term of years, by indenture assigned the same to B. for the unexpired residue of his term, B. covenanting that he, his executors, &c., would, at all times during so long as he or they should be in possession or receipt of the rents, produce, and profits of the premises, pay to the lessors the rents, galeages, and wayleaves reserved and made payable by the original lease, and observe and perform all other the covenants therein contained, and would at all times thereafter keep harmless and indemnified A., his heirs, &c., from and against the rents, covenants, &c., in the said lease, and from and against all actions, &c., for and in respect of the same covenants, or otherwise in relation thereto.

In covenant by A. against B. upon this indenture, the declaration assigned two breaches,—first, non-payment of the rents and galeages, &c., accruing whilst B. was in possession or receipt of the rents, produce, and profits of the premises,—secondly, that B. had neglected to keep A. indemnified. Plea,—to the whole declaration,—that, at the times when the said rents and galeages became due, B. was not in possession or receipt of the rents, produce, or profits by the indenture assigned, &c.:

Held, that the issue raised by this plea was an immaterial issue, inasmuch as the restrictive words, “so long as B., his executors, &c., should be in possession or receipt of the rents, produce, and profits of the premises,” did not extend to the covenant to indemnify; and, consequently, that, the jury having found for the defendant on the issue joined on that plea, A. was entitled to judgment *non obstante veredicto*. *Crossfield v. Morrison*, 286

3. *Covenant for Title.*—On the sale of a messuage, &c., the vendor,—by a deed, reciting that his wife was the heir of A. H., deceased, that A. H. had died intestate, and that the vendor and his wife, or one of them, were or was seized in fee, and after further reciting a settlement made on the marriage of the vendor and his wife, giving them a power of appointment, the power was executed in favour of H. S. Y. in fee,—covenanting “that for and notwithstanding any act, matter, or thing by them the vendor and his wife, or either of them, or the said A. H., made, done, &c., to the contrary,” they, the vendor and his wife, or one of them, were or was lawfully and rightfully seized of the messuage, &c., and had lawful and absolute authority to appoint, &c., and that it should be lawful for H. S. Y., his heirs,

&c., peaceably and quietly to hold the messuage, &c., without any lawful let, suit, &c., by them the vendor and his wife, or either of them, their or either of their heirs, &c., or from or by any other person or persons whomsoever lawfully or equitably claiming or to claim by, from, or under, or in trust for him, them, or either of them, or the said A. H.; and that, free and clear, &c., of, from, and against all gifts, grants, encumbrances, &c., already or thereafter to be had and made, &c., by the vendor and his wife, or either of them, or the said A. H. deceased, or by any other person or persons lawfully or equitably claiming or to claim by, from, or under, or in trust for them, or any or either of them, or by their or any or either of their acts, deeds, means, defaults, or procurement.

The declaration, in an action by the executors of the covenantee, after setting out the covenant for quiet enjoyment, assigned a breach of that covenant as follows:—“that the said H. S. Y., during his lifetime, was not permitted, nor was he able, peaceably and quietly to hold the said messuage, &c., without the lawful let, &c., of the defendant and his wife, and of, from, and by all other persons whomsoever, lawfully and equitably claiming and to claim by, from, and under, and in trust for him and them and the said A. H. deceased; but, on the contrary thereof, after the making of the indenture, and during the lifetime of the said H. S. Y., one P. H., who then claimed, and from thence hitherto hath claimed, and still doth claim from, under, and as heir-at-law to the said A. H. deceased, lawful right and title to the said messuage, &c., caused a declaration in ejectment to be served on the said H. S. Y.” The declaration then set out a recovery in ejectment by P. H., claiming as above, and an eviction of the said H. S. Y. by due process of law.

To this declaration, the defendant pleaded, *inter alia*, that A. H. died intestate, leaving the defendant's wife her only child and heir-at-law, and that the said H. S. Y., intending, &c., instigated P. H. to claim right and title to the messuage, and to bring ejectment; and so the defendant said that the said H. S. Y., of his own wrong, and by and through his own act and procurement, was evicted, &c.

The plaintiffs replied *de injuria*:

Held,—first, that, assuming that the recital in the deed,—that the vendor's wife was heir of A. H.—would have operated as an estoppel against the plaintiff's testator, after eviction by title paramount, if properly pleaded and relied upon, such estoppel was waived by joining issue upon a replication which put in issue the fact of the wife's heirship alleged in the plea, instead of rejoining the estoppel:

Secondly, that, excluding such allegation

of the heirship of the defendant's wife, the plea afforded no answer to the action :

Thirdly, that the allegation in the declaration that P. H. *claimed*, as heir *de A. H.*, lawful title to the premises, though possibly objectionable on special demurrer, on the ground of uncertainty, must, after being pleaded over to, be understood to mean, not merely that he *claimed*, but that he *had* lawful title :

Fourthly, that the generality of the terms of the covenant for quiet enjoyment was not restricted by the introductory words,—for and notwithstanding, &c.,—of the covenant for title. *Young v. Raincock*, 310

6. *Covenant of Indemnity*.]—In an action for the breach of a covenant of indemnity contained in an indenture of November, 1842, the declaration set forth an indenture of January, 1809, being a settlement made on the marriage of A. with B., by which provision was made for effecting a policy of assurance on the life of B., the proceeds of which were to be subject to the appointment of A. and B., or of the survivor, in favour of a child or children of the marriage: it then set out a settlement of March, 1840, made upon the marriage of C., a daughter of A. and B., with D., reciting the death of A. without having exercised the power of appointment, by which deed C., with the consent of D., her then intended husband, assigned all her interest in any fortune to which she might become entitled under the will of her mother, to trustees, for the separate use of C., with a power of appointment by C. in favour of children of that marriage. Of these deeds no profit was made. The declaration then set out, with profit, the indenture of November, 1842,—reciting the death of B., that she had made a will, dated in July, 1840, whereby she appointed the sum of 2000*l.* to be settled “upon the trusts declared in the indenture of settlement of March, 1840, so far as the rules of law and equity would permit, and she had power so to direct and appoint, but, if she had not such power, then she willed and appointed that the 2000*l.* should be paid to C., or as C. should by writing direct and appoint, for her separate use,”—and further reciting that by another indenture the plaintiffs became trustees under the indenture of March, 1840, that they had received the 2000*l.*, which was property of a personal nature to which C. was beneficially entitled under the will of B., and that the same was in their hands subject to, and charged in equity with, the trusts of the indenture of March, 1840, that D. was desirous to obtain from the plaintiff a loan of the 2000*l.*, and that it was considered that B. had not power to appoint the 2000*l.* to be settled

VOL. VII.—80

upon the trusts of the indenture of March, 1840, and therefore that, under the alternative appointment made by her, C. had become entitled thereto absolutely for her separate use, but that a question had been made whether it was not subject to the assignment made by the indenture of March, 1840, wherefore the said C., with the approbation of D., her husband, had proposed and consented that the 2000*l.* should be paid to the plaintiffs as trustees, to be held by them upon the trusts therein declared, they being indemnified by C. and D.

The declaration then averred that the 2000*l.* had been accordingly lent by the plaintiffs to D.; that that sum remained unpaid; that, by an indenture of September, 1845, T. S. and others were appointed trustees of the indenture of March, 1840, in place of the plaintiffs; that T. S., as such trustee, had commenced a suit in Chancery against the plaintiffs and others to compel them to invest the 2000*l.* so lent to D.; that D. had notice of the proceedings, and was required to take upon himself the defence thereto, and to indemnify the plaintiffs; that D. declining to take upon himself the defence, the plaintiffs consented to an order whereby they became liable to transfer to the accountant-general a certain amount of stock, and were put to expense :—

Held,—first, that profit of the indentures of January, 1809, and March, 1840, was not necessary, those indentures being stated by way of inducement only :

Secondly, that the indenture of March, 1840, not deducing title, it was sufficient to set it out in its terms :

Thirdly, that it was not necessary to the maintenance of the action, that the indenture of March, 1840, should be valid as an assignment at law; but that, it was enough if it bound the fund in equity in the hands of the trustees :

Fourthly, that the plaintiffs were not precluded from recovering upon the defendant's contract of indemnity, by their having consented to a decree before hearing,—it not being shown that the decision could be in any degree affected by the stage of the cause in which it was pronounced, or that the plaintiffs, by incurring the expense of prosecuting the suit to the hearing, could have made any effectual defence, or have diminished the damage consequent upon an adverse decision. *Lord Newborough v. Schröder*, 342

II. How pleaded.

In pleading,—except in deducing title,—a deed may, at the option of the party pleading it, be set out, either in its terms, leaving the

court to construe it, or according to its legal effect. *Lord Newborough v. Schröder*, 342

III. By acceptance of Letters-Patent, 589 (a).

DAMAGES.

Liquidated Damages.

A. and B. entered into the following agreement:—"In consideration that A., of Macclesfield, surgeon and apothecary, will engage me, the undersigned B., as assistant to him as a surgeon, &c., I, the said B., promise the said A. that I will not at any time practise as a surgeon or apothecary at Macclesfield, or within seven miles thereof, under a penalty of 500*l.*: and I, the said A., do hereby agree with the said B., to engage the said B. as an assistant to me as a surgeon, &c., on the terms aforesaid."—Held, that the 500*l.* was not a penalty, but liquidated damages. *Sainter v. Ferguson*, 716

And see PLEADING, II.

REFLEVIN, 2.

TROVER, I, 2.

DEBT.

See PLEADING, II.

DEBT IN THE DETINET.

For goods, mistaken for an action of detinue. 47 (a).

DECREE BY CONSENT.

See COVENANT, I, 4.

DEMAND.

Of Money payable under an Award—See ARBITRAMENT, IV.

II. *Of Rent*—See CONDITION.

DEMURRER.

See BILL OF EXCHANGE, I.

DESCRIPTION.

Of Parties in pleading—

See BILL OF EXCHANGE, I.

CHRISTIAN NAME.

DETINUE.

1. The bailment in detinue is not traversable. *Clooseman v. White*, 43
2. Distinction between this action and debt in the detinet. 47 b.
3. Interpleader in. 47 a.

DEVISE.

Construction of.

1. *Description of Premises.*—A testator, having four sons, A., B., C., and D., devised to his sons B., C., and D., "all those my five freehold messuages, tenements, dwelling-houses, and premises, with their appurtenances, at R., in the occupation of J. P. or his under-tenants, to hold to them, their heirs and assigns for ever, as tenants in common." The property in the occupation of J. P. at the time of the making of the will, and of the testator's death, consisted of five cottages and about three acres of meadow land adjoining:—Held, that the land passed to B., C., and D., as well as the cottages. *Doe d. Hemming v. Willette*, 709
2. *Reversion in Fee.*—Testator, by his will,—reciting that he had contracted with A. for the sale of a freehold messuage at M., but that he had never executed any conveyance thereof to him,—devised the same to B. and C., their heirs and assigns, in trust, on receipt of the purchase-money, to enable them to convey to A. He then gave a leasehold estate to his two sisters, "their heirs, executors, administrators, and assigns, for and during the term of their natural lives, or the lives of the several persons for whose lives the same was held, and the life of the longest liver of them, without impeachment of waste." And, after the death of one of the sisters, he gave the whole of his said "leasehold estate" to the survivor, her heirs, &c., absolutely.

The will then proceeded as follows:—"I give unto my said sisters my silver-hafted knives and forks, and my silver table-spoons equally to be divided between them; and I give all the rest of my household furniture, books, linen, and china (except as hereinafter mentioned), goods, chattels, estate, and effects, of what nature or kind soever, and wheresoever the same shall be at the time of my decease, unto the said B. and C., their executors, administrators, and assigns, in trust, as soon as conveniently may be, to sell and dispose of the same, and to apply the money by such sale arising, towards payment of my debts, &c.: I give and bequeath all my ready money, and the money arising by sale of my said premises at M., to be received by my said trustees, securities for money, and all other sum or sums of money that may be due and owing to me at the time of my decease, unto my said sisters," &c. And B. and C. were appointed executors:—

Held, that the trustees, B. and C., took the reversion in fee in other lands of which the testator, at the time of making his will (made before 1838), was seised for life, with contingent remainders which failed, with the rever-

sion in himself, in fee. *Sanderson v. Dobson*, 81

DISTRESS.

Power of, conferred on grantor of corody by customary tenant of the land charged. 473

EASEMENT.

(*Aisiamentum*.) Granted in the name of a corody, by customary tenant.

468 (b), 471, 473, 475

ECCLESIASTICAL LEASE.

Confirmation of.

The perpetual curate of a curacy augmented by the governors of Queen Anne's bounty, with the confirmation of the ordinary and immediate patron, granted a lease for years of unopened mines which had not before been leased; but the patron of the advowson was no party:—Held, that the lease was void at common law, for want of confirmation by such patron paramount; and that it was not set up by the acceptance of rent by the lessor's successor in the curacy,—the only effect of such acceptance of rent being, to create a tenancy from year to year. *Doe d. Brammall v. Collinge*, 939

EJECTION.

I. *Service of Declaration and Notice.*

1. In ejectment to recover possession of several houses comprised in one lease, the court, as to some of them, granted a rule nisi for judgment against the casual ejector, upon an affidavit showing service of the declaration and notice, by affixing copies on the outer doors, the premises being unoccupied and shut up, and by serving two persons who claimed to be assignees respectively of part of the premises, and the attorney of one of them; and they afterwards made the rule absolute upon affidavit of the service thereof in the same way. *Doe d. Chippendale v. Roe*, 125
2. The court granted a rule for judgment against the casual ejector, where the premises were held under lease by several persons trading under the firm of W., F., & Co., upon an affidavit of service of the declaration and notice upon the manager of the works, upon the premises, and of personal service on one of the firm,—the affidavit stating them to be joint-tenants of the premises. *Doe d. Bennet v. Roe*, 127

II. *Under 4 G. 2, c. 28, s. 2.*

In ejectment brought upon a right of re-entry, under the 4 G. 2, c. 28, s. 2, it must appear that the landlord had a power to re-enter, in

respect of the non-payment of half a year's rent, at the time of affixing the declaration and notice upon the premises. *Doe d. Dixon v. Roe*, 134

III. *Action for Mesne Profits.*

The court refused to set aside as frivolous, a demurrer to a replication to a plea of *liberum tenementum*, in trespass for mesne profits, setting up the judgment in ejectment by way of estoppel. *Bather v. Brayne*, 815

ELEGIT.

See PRACTICE, I. 8.

ENTIRETY OF CONTRACT, 115, n.

ESTOPPEL.

See COVENANT, 3.

EVICTION.

See LANDLORD AND TENANT, I.

EVIDENCE.

I. *Subscribing Witness.*

At the trial of an action against the sheriff for taking insufficient pledges in replevin, notice having been given to the defendants to produce the bond, the plaintiff's counsel called for it; and, on the defendants' counsel declining to produce it, a copy obtained from the sheriff's office was put in, and was about to be read, when the defendants' counsel interposed, and offered the original, and then objected that it could not be read, without calling the subscribing witness. The judge overruled the objection:—Held, that he was right in so doing. *Edmonds v. Challis*, 413

II. *Commission to examine Witnesses.*

The court will not, without special grounds, depart from the ordinary form of a commission for the examination of witnesses under the 1 W. 4, c. 22. *Follett v. Delany*, 775

III. *Certified Copies of Proceedings in the Insolvent Court.*

A certified copy, under the seal of the insolvent debtors' court, of the assignment from the provisional assignee, is, under the 7 G. 4, c. 57, s. 19, evidence of such assignment, without proof of any petition having been filed by the insolvent, or of any appointment of an assignee. *Doe d. Hemming v. Willets*, 709

IV. *Stewards' Accounts.*

An ancient roll, found amongst the muniments of a manor, containing the reeve's account of moneys received by him on account of the lord, followed by an account of moneys ex

pended by him on account of the lord, was tendered as evidence of a fact noticed in one of the items of discharge for which the reeve took credit in the account. This entry was rejected, on the ground that it did not appear on the face of the account that the reeve gave credit for any sum applied to the discharge of that particular item. Held (by COLTMAN, MAULE, CRESSWELL, and V. WILLIAMS, JJ., *absente, et, ut videtur, dissentiente*, WILDE, C. J.), that the evidence was properly rejected. *Doe d. Kinglake v. Bevis*, 456

V. *Private Books*—See PRINCIPAL AND AGENT, 4.

VI. *Identity of Defendant*—See BANKRUPT, II.

And see INDEMNITY.

TROVER, II.

EXECUTOR.

Allegation of pleading by, of proof of will, 402 (A)

Possession by, 611 (a)

FACTOR.

Set-off against Principal, of Debt due from the Factor.

1. A. buys goods of B., knowing that B. is selling them as factor. He cannot, in an action by the principal for the price, set off a debt due to him from B., although it is found that A. made the purchase *bona fide*. *Fish v. Kempton*, 687
2. But, *semble*, that payment to B., though made prematurely, would, if made *bona fide*, bind the principal. *Id.*

FINE.

For license to demise for twelve years, 476

FLORENCE.

Affidavit sworn before the British Minister—See HUSBAND AND WIFE, 1.

FOREIGN ATTACHMENT, 610.

HERBAGIUM TERRÆ.

Grant of, 483.

HERIOTS, 466 (d).

HOCKDEY.

Turn of, 476.

HUSBAND AND WIFE.

Conveyance by Married Women, under the 3 & 4 W. 4, c. 74.

1. *Affidavit*.]—The court will not grant a rule

to enable a married woman to execute a conveyance without her husband's concurrence under the 3 & 4 W. 4, c. 74, s. 91, upon a mere statement that the husband, a seaman, has gone abroad, and has not been heard of for some years, and that the wife has been informed that he is dead. The affidavit must show some reasonable ground for presuming the statement to be true. *Ex parte Elizabeth Taylor*, 1

The court refused to direct the proper officer under the 3 & 4 W. 4, c. 74, to receive and file an acknowledgment, where the affidavit of verification was sworn before the British minister at Florence,—it not appearing that there was any difficulty in getting it sworn before some properly constituted authority at that place. *In re Baroness Dunsany*, 119

2. *Wife's Provision*.]—Where property is sold under the compulsory provisions of an act of parliament, that part of the rule of Hilary term, 4 W. 4, which directs inquiry to be made of a married woman at the time of acknowledging a deed to convey her interest under the 3 & 4 W. 4, c. 74, whether any provision is made for her in consideration of her so giving up her interest, is inapplicable. *In re Elizabeth Ellen Foster*, 120

IMMATERIAL ISSUE.

See COVENANT, I. 2.

PLEADING, VIII. 4.

IMMATERIAL TRAVERSE.

See REPLEADER.

INCORPORATED COMPANY.

See JOINT-STOCK COMPANY.

INDEMNITY.

Proof of.

A., tenant to B., received notice from C., a mortgagee of C.'s term, that the interest was in arrear, and requiring payment to her, B., of the rent then due. A., notwithstanding this notice, paid the rent to B. (under an indemnity which turned out to be unauthorized), and was afterwards compelled, by distress, to pay the amount over again to C.:—At the trial, in support of a special count founded upon the indemnity, the plaintiff proved that one H. was B.'s general attorney; and he then proposed to prove that H. as such attorney, had given the indemnity:—Held, that this evidence was not admissible, in the absence of proof of H.'s authority to make such a contract for his client. *Higgs v. Scott*, 63

And see COVENANT, I. 4.

INDORSEMENT.

On Writ of Summons—See PRACTICE, I., 2, 3, 4.

INDUCEMENT.

See PROPERTY.

INITIAL.

See BILL OF EXCHANGE, I.
CHRISTIAN NAME.

INSOLVENT DEBTOR.

Proof of Proceedings—See EVIDENCE, III.

INSPECTION OF DOCUMENTS.

See PRACTICE, XI.

INSURANCE.

Changing Venue in Action on a Policy—See PRACTICE, VII., 1.

INTERPLEADER.

Maintenance of Claim.

1. *Affidavits*.]—Upon an application for a rule or order under the interpleader act, an affidavit by the claimant himself, in support of his claim, is not indispensable. *Webster v. Delafield*, 187

And *semble*, per MAULE, J., that no affidavit at all is necessary. *Id.*

The sheriff having seized goods under a *fi. fa.*, a claim was made on behalf of A., who was resident in Paris. Upon an interpleader summons, A.'s attorney made an affidavit, that he had been informed, and, from documents, vouchers, and receipts in his possession, believed, that the goods seized were the *bona fide* property of A. :—Held,—V. WIL-
LIAMS, J., *dissentiente*,—that this was a sufficient maintaining of the claim, to justify the judge (or the court, on the judge's refusal) in directing an issue. *Id.*

2. *Security for Costs*.]—And it was made part of the rule, that the claimant should give security for costs. *Id.*

IRREGULARITY.

See PRACTICE, I., 1.

ISSUABLE PLEA.

See PLEADING, VIII., 5.

JOINT-STOCK COMPANY.

How declared against.

A company may be declared against by the name by which it is known, without alleging it to

be chartered or incorporated or registered. *Woolf v. The City Steamboat Co.*, 103

And see RAILWAY COMPANY.

JOINT-TENANTS.

How seized, 455 (a).

JUDGMENT AS IN CASE OF A NONSUIT.

See PRACTICE, XIV.

KNOWLEDGE.

Not Notice—See BILL OF EXCHANGE, III., 1.

LANDLORD AND TENANT.

I. *Partial Eviction, Effect of.*

1. An eviction by a landlord of his tenant, from a part of the demised premises, creates a suspension of the entire rent during the continuance of the eviction ; but the tenancy is not thereby put an end to ; nor is the tenant thereby discharged from the performance of his covenants, other than the covenant for the payment of rent. *Morrison v. Chadwick*, 266

2. Where, therefore, in assumpsit by a landlord against his tenant for breach of a promise to use the premises in a tenant-like manner during the continuance of the tenancy, the latter pleaded, that, during the continuance of the tenancy, and before any breach, the former entered upon part of the premises and evicted him therefrom, and that he thereupon relinquished and gave up, and the landlord had and thence hitherto retained the possession of, the residue of the premises :—Held, that the plea was bad, inasmuch as it did not show a *dissolution of the tenancy*, by mutual consent. *Id.*

II. *Surrender.*

In assumpsit by a landlord against his tenant for breach of a promise to use the premises in a tenant-like manner during the continuance of the tenancy, the defendant pleaded, that, during the tenancy, and before any breach, the premises, and the defendant's estate and interest therein, were duly surrendered to the plaintiff by act and operation of law, that is to say, by the defendant's quitting the same premises, and every part thereof, with the license and consent of the plaintiff, and relinquishing the possession thereof to the plaintiff, with the intention of putting an end to the tenancy, and by the plaintiff's then accepting such possession, with the intention of putting an end to the same tenancy :—Held, that, if the tenancy continued up to the time of the arrangement stated in the plea, such arrangement would not enure as a

surrender by act and operation of law: and also that it was a valid objection to the plea, on special demurrer, that it amounted only to an argumentative denial that there had been any breach during the tenancy. *Morrison v. Chadwick*, 266

LEASE.

See ECCLESIASTICAL LEASE.

LEASE AND RELEASE.

Profert of release to bargainee unnecessary, where release itself is to uses. 375 (b).

LEGAL EFFECT.

See PLEADING, VIII., 2.

LEGAL MAXIMS.

Prohibetur ne quis faciat in suo quod nocere possit alieno. 344
Sic utere tuo ut alienum non laedas. 344

LIBEL.

Innuendo.

1. A count in an action for a libel, stated that the defendant, intending to cause it to be believed that the plaintiff and one J. H. had transferred, or caused to be transferred, a certain amount of Bank-stock from the name of one W. T., by means of a power of attorney obtained by them from W. T. by undue influence, at a time when he was mentally incompetent to do any act requiring reason and understanding, — published the following, "There is strong reason for believing that a considerable sum of money was transferred from Mr. T.'s (meaning the said W. T.'s) name in the books of the Bank of England, by power of attorney obtained from him by undue influence after he became mentally incompetent to perform any act requiring reason and understanding (thereby meaning that the plaintiff and J. H. had transferred, or caused to be transferred, the said money from the said W. T.'s name in the said books of the said bank, by means of a power of attorney obtained by them from the said W. T. by undue influence exercised by them over the said W. T., and at a time when the said W. T. had become and was mentally incompetent to give a power of attorney and to perform any act requiring reason and understanding.)"

The jury having found a general verdict for the plaintiff:—Held, on motion in arrest of judgment, that the count was good, and that the innuendo did not improperly extend

the meaning of the libel. *Turner v. Merryweather*, 251

2. In case for a libel, the declaration stated, by way of inducement, that the plaintiff was a barrister and the editor and proprietor of a weekly publication called "The Medical Times," and also secretary to the committee of "Poor-Law Medical Officers," and to the "Convention of Poor-Law Medical Officers;" that there existed an association called "The National Institute of Medicine;" that certain medical poor-law-union officers were endeavouring to bring about an amelioration of the then-existing system of poor-law medical relief; and that "The National Institute of Medicine" was willing to lend its assistance to the medical poor-law-union officers, and to allow that body the use of certain rooms held by them.

The declaration then, in the first count, alleged that the defendant, in a weekly publication called "The Lancet," published, "of and concerning the plaintiff," the following:—"In our last, we advised the medical officers of the poor-law-unions to adopt an independent course, to trust to the justice of their cause, and to their own legitimate exertions, for an amendment of the grievances of which they so justly complain:" and, after cautioning those persons not to suffer "The National Institute of Medicine," or "The Committee of Poor-Law Medical Officers," to meddle with their affairs, the libel proceeded—"We would exhort the medical officers to avoid the traps set for them by desperate adventurers (thereby meaning the plaintiff, among others), who, participating in their efforts, would inevitably cover them with ridicule and disrepute."

The second count stated that the defendant further published "of and concerning the plaintiff," the following,— "We need not here dwell upon the impolicy of the connexion between the present agitation and 'The National Institute,'—a body which has disgusted the government,—and with other persons not belonging to the profession (thereby meaning the plaintiff, as such barrister as aforesaid), and whose weekly vocation it is to bring everything belonging to the profession into disrepute and contempt" (thereby meaning that the plaintiff was in the habit as editor of the said weekly publication called "The Medical Times" as aforesaid, of bringing the medical profession into disrepute and contempt).

The third count described the plaintiff as "a quack lawyer and mountebank," and an "impostor;" and the fourth set out matter tending to hold the plaintiff up to ridicule.

After verdict for the plaintiff upon all these counts, with entire damages:—

Held, by the court of error,—that the words charged in the first count were libellous.
Wakley v. Healey, 591

3. Held also, that the words charged in the second count were libellous, without the aid of the innuendo: and

Held also, that the count was not objectionable, by reason of the want of an averment that the libel was published of and concerning the plaintiff *as editor of the weekly publication referred to*,—that being sufficiently shown by the libel itself. *Id.*

4. *Semble*, that this count would have been good without any special averment. *Id.*

LIBERUM TENEMENTUM.

See EJECTMENT, III.

LICENSE.

To villein to reside out of the lordship to which he was regardant. 466 (c).

LIMITATION OF ACTIONS.

Under 3 & 4 W. 4, c. 42, s. 27.

1. The 42d section of the 3 & 4 W. 4, c. 27, is not repealed by the 3 & 4 W. 4, c. 42, s. 3. *Humfrey v. Gery*, 567
2. A. was, from the 2d of July, 1805, till the 10th of July, 1841 (when he was found a lunatic), and B., his committee, had ever since been, seised as of fee of two-thirds of a fee-farm rent of 20*l.* 5*s.* *per annum*, payable on the 29th of September and 25th of March, created by letters-patent of the 29 H. 8. No payment of this rent, or of any part thereof, had been made since March, 1831, nor had there been any acknowledgment in writing relating thereto:—Held, that the case was governed by the 42d section of the 3 & 4 W. 4, c. 27, and, consequently, that neither the lunatic nor his committee was entitled to recover any arrears of the rent after the expiration of six years from the 29th of September, 1831. *Id.*

LIQUIDATED DAMAGES.

See DAMAGES.

LONDON SMALL DEBTS COURT.

See COUNTY-COURT, I. 1.

LUNATIC.

See LIMITATION OF ACTIONS.

MANAGING CLERK.

See BANKRUPT, I.

MARRIAGE.

Breach of Promise of.

In assumpsit for breach of promise of marriage, the declaration stated, that, in consideration that the plaintiff, being sole and unmarried, at the request of the defendant had promised the defendant to marry the defendant within a reasonable time, the defendant promised the plaintiff to marry her within a reasonable time; that the plaintiff, confiding in the promise of the defendant, had from thenceforward remained sole and unmarried, and had always, until she had notice that the defendant was married, been ready and willing to marry him; that although a reasonable time had elapsed since the making of the defendant's promise, yet the defendant had not married the plaintiff, but, on the contrary thereof, the defendant, at the time of making his promise, and from thenceforward, had been and still was, married, &c.; and that the plaintiff did not know, at the time of the defendant's making his said promise to her, nor for a long time afterwards, that the defendant was married:—Held, on motion in arrest of judgment, that the declaration disclosed a sufficient consideration for the defendant's promise. *Wild v. Harris*, 999. [Approved by the court of Exchequer, *Milward v. Littlewood*, M. T., 1850.]

MEMORANDA, 608.

MESNE PROFITS.

See EJECTMENT, III.

MESSENGER.

Fees of—See BANKRUPT, II.

MINES.

Rights and Duties of Owners of.

1. *Semble*, that it is the right of each of the owners of adjoining mines,—where neither mine is subject to any servitude to the other,—to work his own mine in the manner which he deems most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine; so long as such prejudice does not arise from the negligent or malicious conduct of his neighbour. *Smith v. Kenrick*, 515
2. The plaintiff was possessed of a colliery, called A., and the defendant of a colliery adjoining, called B., which was upon a higher level than A. Before the defendant became possessed of colliery B., one Jones, who then held it,—but between whom and the defendant it was found, as a fact, that there was not

any privy, either of contract or of estate,—made three large holes called thyrings, in and through a vertical seam of coal, part of colliery A., and forming a barrier between the chambers in colliery A. and those in colliery B. At the time the defendant first became the occupier of B., there was a large subterranean body of water therein, which communicated with, and was fed by, springs in the neighbourhood. This water was on a higher level than the chambers of B., and separated from them by a thick horizontal bar of coal which was part of colliery B. The chambers of B. were on a higher level than the thyrings above mentioned, and the thyrings were on a higher level than the chambers of A.; and, consequently, the effect of removing the horizontal bar of coal in B. necessarily was, that the water above mentioned would, of itself, flow into the chambers of B., and that a large portion thereof would also flow on of itself from the chambers of B., through the thyrings, into the chambers of A. The defendant, knowing that the thyrings were then open, and that the effect of removing the horizontal bar of coal in B. would be as above stated, nevertheless did remove the same, for the purpose of obtaining the coal, and so working his mine in the manner most advantageous to himself. In consequence of the removal of this horizontal bar of coal in B., the water flowed into the chambers of B., and thence, through the thyrings, into the chambers of A., and inundated the same:—Held, that the defendant was not responsible for the injury so occasioned. *Smith v. Kenrick*, 515

And see COVENANT, I., 2.

ECCLESIASTICAL LEASE.

MONEY PAID.

Voluntary Payment.

1. A., tenant to B., received notice from C., a mortgagee of B.'s term, that the interest was in arrear, and requiring payment to her, B., of the rent then due. A., notwithstanding this notice, paid the rent to B. (under an indemnity which turned out to be unauthorised), and was afterwards compelled, by distress, to pay the amount over again to C.:—Held, that the payment to B. was a voluntary payment, with full knowledge of the circumstances, and therefore not recoverable back in an action for money had and received. *Higgs v. Scott*, 63
2. At the trial, in support of a special count founded upon the indemnity, the plaintiff proved that one H. was B.'s general attorney; and he then proposed to prove that H. as such attorney, had given the indemnity:—Held,

that this evidence was not admissible, in the absence of proof of H.'s authority to make such a contract for his client. 18.

MUSICAL COMPOSITION.

See COPYRIGHT.

NAMR.

See CHRISTIAN NAME.

NONSUIT.

Judgment as in Case of—See PRACTICE, XIV.

NOTICE.

- I. *Of Act of Bankruptcy*—See BANKRUPT, I.
- II. *Of Dishonour*—See BILL OF EXCHANGE, III.
- III. *Of Trial*—See PRACTICE, XIV.
- IV. *Of Objections, under 5 & 6 Vict., c. 45, s. 16*—See COPYRIGHT, 2.

NUL TIEL RECORD.

See PRACTICE, X.

OBJECTIONS.

Notice of, under 5 & 6 Vict., c. 45, s. 16—See COPYRIGHT, 2.

OVERLAND, 468 (g).

OYER.

Demand of, how complied with—See PRACTICE, XVIII.

PANNAGE.

Pannagium, 465, 473.

Pessona, 467, 473, 474.

PARCENERS.

How seized, 455 (a).

PARTICULARS OF DEMAND.

See PRACTICE, IV.

PAUPER.

Settling Action in the Absence of his Attorney.

The court will not interfere, even in the case of a plaintiff suing in *forma pauperis*, to prevent effect being given to a settlement between the parties,—although it be evident that the attorney will lose his costs,—unless the settlement be clearly collusive. *Francis v. Webb*, 731

PAYMENT.

- I. *Voluntary*—See MONEY PAID.
- II. *Of Money into Court*—See COSTS, III.

PENALTY.

See DAMAGES.

PER MY ET PER TOUT.

Mistake as to the meaning of this term, 455 (a).

PERPETUAL CURATE.

Lease by—See ECCLESIASTICAL LEASE.

PETER'S PENCE, 477 (d).

PETITIONING-CREDITOR.

See BANKRUPT, II.

PETITION OF RIGHT.

By abbot, praying to be relieved from a corrody, commission *ad inquirendum* thereon, and demurrer to the inquisition returned, 461 (n).

PIEPOUDER COURT, 477 (b).

PIRACY.

See COPYRIGHT.

PLEADING.

I. ASSUMPSIT.

Immaterial Matter.—In an action for the breach of a contract to employ the plaintiff for a given time, charging the defendants with having wrongfully and without reasonable or probable cause dismissed the plaintiff, the defendants pleaded, that they did not, *wrongfully, without reasonable or probable cause*, dismiss the plaintiff, *modo et forma*:—Held, that this merely put in issue the *fact* of the dismissal, the rest being immaterial. *Powell v. Bradbury*, 201

II. DEBT.

Free answering damages.—A declaration in debt contained three counts,—the first on a bill of exchange, the second, for money lent, and the third, upon an account stated; concluding to the plaintiff's damage of 10*l.*, &c. The defendant pleaded,—first, as to 10*l.*, parcel of the moneys in the first and last counts (averring identity), payment and acceptance in satisfaction before action brought;—secondly, as to the residue of the first and last counts, payment and acceptance, after action brought, of 50*l.*, in satisfaction and discharge “of the causes of action in the introductory part of the plea mentioned;”—thirdly, to the second count, never indebted:—Held, that the second plea sufficiently answered the damages for the detention of the moneys mentioned in the first and third counts. *Gell v. Burgess*, 16

III. DETINUE.

Bailment.—The bailment in detinue is not traversable. *Cloesman v. White*, 43

IV. CASE.

See RAILWAY COMPANY.

V. COVENANT.

See COVENANT.

VI. REPLEVIN.

In an action against the sheriff for taking an insufficient replevin-bond, the declaration alleged that the (old) county-court had not jurisdiction at the time of taking the bond:—Held, on motion in arrest of judgment, that the declaration was sufficient, without alleging a want of jurisdiction at the time of the plaint to the sheriff. *Edmonds v. Challis*, 413

And see REPLEVIN.

VII. TRESPASS.

Plea of not possessed.—A plea of not possessed, to an action of trespass, takes the case out of the jurisdiction of the new county-courts. *Timothy v. Farmer*, 814

VIII. PARTICULAR POINTS.

1. *Argumentative Traverse.*—See LANDLORD AND TENANT, II.
2. *Deducing Title.*—In pleading,—except in deducing title,—a deed may, at the option of the party pleading it, be set out, either in its terms, leaving the court to construe it, or according to its legal effect. *Lord Newborough v. Schröder*, 342
3. *Eviction.*—See COVENANT, I, 3. LANDLORD AND TENANT, I.
4. *Immaterial Issue.*—In an action upon an agreement whereby, in consideration of the plaintiff's staying the proceedings in an action against J. S., the defendant promised to pay him a certain sum out of the proceeds of the sale of a chattel deposited with him by J. S. for that purpose, the declaration alleged that the plaintiff, relying upon the promise of the defendant, countermanded the notice of trial in the action against J. S., and stayed the proceedings. Plea—that the plaintiff was not ready and willing to accept and receive the 40*l.* out of the purchase-money for the said picture, in manner and form, &c.—Held, bad, as putting in issue an immaterial allegation. *Hudson v. Haslam*, 835
And see COVENANT, I, 2.
5. *Issuable Plea.*—In an action upon an agreement whereby, in consideration of the plaintiff's staying the proceedings in an action against J. S., the defendant promised to pay him a certain sum out of the proceeds of the sale of a chattel deposited with him by J. S. for that purpose, the declaration alleged that

the plaintiff, relying upon the promise of the defendant, countermanded the notice of trial in the action against J. S., and stayed the proceedings:—Held, that a plea, that, after the alleged countermand of notice of trial, the plaintiff further continued the proceedings against J. S., concluding with a special traverse, was an issuable plea. *Hudson v. Haslam*, 825

6. *Non-assumpsit; What admissible under.*—See PRINCIPAL AND AGENT, 3.
 7. *Profrat.*—See PROPERTY.
 8. *Uncertainty.*—See RAILWAY COMPANY, L, 3.

PLEDGE.

Deposit of goods in, 57 (b).

POSTEA.

Endorsement of allowance of set-off on. 671 (b).

POSTPONING TRIAL.

See PRACTICE, VIII., 2.

PRACTICE.

I. Process.

- Writ of Summons.*—1. The omission to insert in a writ of summons the county of the defendant's residence, is a mere irregularity, which must be taken advantage of within a reasonable time. *Ross v. Gandell*, 766
2. The endorsement on a writ of summons claiming a sum for principal and interest, should either state the amount of the interest claimed, or the date from which it is to be calculated. *Bardell v. Miller*, 753
3. The following endorsement was held insufficient:—"The plaintiff claims 102*l.* 5*s.*, and interest thereon at 5*l.* per cent. per annum from the 31st of March (not saying what March) till payment, for debt, and 2*l.* 2*s.* for costs," &c. *Ib.*
4. The endorsement of the time of service of a writ of summons, pursuant to the statute 2 W. 4, c. 39, s. 1, and the rule of court of M. T., 3 W. 4, r. 3, may be made by a marksman. *Baker v. Coghlan*, 131
- Distingas.*—5. The 10th section of the 2 W. 4, c. 39, does not apply to writs of *distingas*. *Jones v. Boxer*, 58
6. A writ of summons issued against the defendant on the 8th of August, 1848, and was returned and filed on the 8th of January, 1849,—which was a day too late. A *distingas*, however, had been obtained on the 1st of November, 1848, under which an appearance was entered for the defendant:—Held, that the declaration properly alleged the defendant to have been summoned "by virtue of a writ issued on the

8th of August, 1848,"—the *distingas* coming in the place of personal service of the summons. *Jones v. Boxer*, 58

7. The court will not entertain a motion to discharge a rule for a *distingas*, on the ground of alleged misstatements in the affidavit upon which it was obtained. *Ensor v. Griffin*, 781
- Elegit.*—8. On the 4th of February, 1840, judgment was signed against the defendants in an action of debt at the suit of A., B., and C., assignees of D., a bankrupt. C. (who was the official assignee under the *fiat*) died in February, 1848. On the 4th of April, 1849, a writ of *elegit* was sued out at the suit of A., B., and C., without any *sci. fa.*, or suggestion of the death of C., or of the appointment of his successor,—who was stated in the affidavit to have been duly appointed the official assignee of the estate and effects of D. "on C.'s death:—Held, that the *elegit* was regular, in thus following the judgment; and that the affidavit was essentially defective, in not showing in precise terms that the appointment of the new assignee took place before the issuing of the *elegit*. *Roll v. The Mayor, &c., of Gravesend*, 777

II. APPEARANCE.

Under the 2 W. 4, c. 39, s. 3, the application for leave to enter an appearance, upon the return of the *distingas*, must, in term time, be made to the court. *Ross v. Gandell*, 766

III. Deposit in Lieu of Bail—See ARREST, II.

IV. Particulars of Demand.

It is no ground for a new trial of an action before the secondary or under-sheriff, that the particulars of demand are not annexed to the writ of trial. *Hamber v. Roberts*, 861

V. Striking out Counts or Pleas, under Reg. Gen. Hilary Term, 4 W. 4, r. 5.

1. The plaintiffs, as assignees of H. and M., delivered a declaration, the first two counts being in trover for a ship and cargo, alleged in the first count to have been in the possession of H., and, in the second, as having been in the possession of the assignees.

The third count stated that H., before his bankruptcy, being sole owner of a ship, executed a deed-poll under seal, empowering the defendants to sell the ship, and that H. and M. sent the deed-poll to the defendants for the purpose of securing them in respect of the acceptance by them of certain bills of exchange drawn upon them by H. and M.; that the defendants received the deed-poll with full notice and for the purposes aforesaid; but that they refused to accept or to pay the bills; and afterwards sold the ship under co-

lour of the deed-poll, before the bankruptcy of H. and M.

The fourth count stated that H. before his bankruptcy, being sole owner of a ship, executed a deed-poll under seal, of the like tenor and effect as the deed-poll mentioned in the last preceding count; that H. and M. before either of them became bankrupt, wrote a letter to the defendants, instructing them not to sell the ship; that the last-mentioned deed-poll and letter were delivered to the defendants, who held the deed-poll subject to the instructions contained in the letter; yet that the defendants, before the bankruptcy of H. and M., and contrary to the terms of the letter, sold the last-mentioned ship by a bill of sale executed by the vendors before, but completed by the purchasers after, the bankruptcy of H. and M. :—

A judge at chambers having made an order "that the plaintiffs elect between the first and third, and the second and fourth counts, or be at liberty to amend the first and second counts, by confining the same to the cargo,"—on the ground that the counts were apparently founded upon the same principal subject-matter of complaint, within the rule of Hilary Term, 4 W. 4, r. 5,—the court declined to rescind or vary his order. *Dearie v. Henderson*, 71

2. The first count of the declaration stated that the defendants agreed to sell to the plaintiff twenty tons of sal-enixon, to be delivered at a time and place mentioned, and alleged for breach the non-delivery pursuant to the contract. The second count, "for a further breach of the said agreement and promise of the defendants, as aforesaid," stated that, although the defendants, in part performance of the contract, delivered ten tons of an article resembling sal-enixon, as and for a part of the twenty tons so agreed to be delivered, yet that the defendants deceived the plaintiff in this, that the article delivered was not sal-enixon, but an article of a different and inferior description and value,—and alleged for special damage, that the goods had been returned to the plaintiff by the persons to whom he had sold them. A judge at chambers having put the plaintiff to his election to retain, one or other of these two counts, on the ground that they were founded on the same subject-matter of complaint, and were a violation of the 5th rule of Hilary term, 4 W. 4, the court refused to rescind the order. *Ramsden v. Gray*, 961

4. In case, in the nature of waste, by a reversioner against a tenant for life, for cutting down timber, &c., a count alleged, that, by the custom of the country where the lands were situate, beech trees were reckoned timber trees. A judge at chambers having al-

lowed, amongst others, in addition to not guilty, a plea traversing the above allegation,—the court declined to rescind his order. *Mathews v. Mathews*, 1018

VI. Staying Proceedings.

1. *Second Action for the same Cause.*—Where the plaintiff in an action of slander had been nonsuited upon the merits, and afterwards brought a second action against the defendant substantially for the same supposed cause of action, though slightly varying the words charged to have been spoken,—the court stayed the proceedings in the second action, until the costs of the first should have been paid. *Hoare v. Dickson*, 164
2. *F frivolous Demurrer.*—The court refused to set aside as frivolous, a demurrer to a replication of *liberum venementum*, in trespass for mesne profits, setting up the judgment in ejectment by way of estoppel. *Bather v. Brayne*, 815
3. *Action brought without Authority.*—The payee of a promissory note, having paid the amount to the endorsees, on default of the maker, sued the latter in the names of the endorsees, but without any authority from them, and obtained a verdict. The defendant having paid the debt, the court, upon his application, stayed the proceedings, without costs on either side, and each party bearing his own costs of the rule. *Coleman v. Biedman*, 871

VII. Changing Venue.

1. *Policy of Insurance.*—A declaration on a policy of assurance from Baltimore to Liverpool, alleged a loss by perils of the sea. The court refused to allow the venue to be changed from the southern division of Lancashire to London, upon the usual affidavit that the cause of action arose in London and not elsewhere, the declaration showing that such statement could not be correct;—although the policy was effected in London, and the loss was payable there. *Butler v. Fox*, 970
2. *Local Action.*—In a local action, a suggestion to try the cause in an adjoining county cannot be granted before issue joined. *Tolson v. The Bishop of Carlisle*, 79
3. *Special Grounds.*—The venue having been changed, at the instance of the defendant, upon the common affidavit, from Gloucestershire to Bristol, and restored to Gloucestershire without an undertaking to give material evidence there,—the court refused to restore it to Bristol, upon an affidavit that the cause of action arose wholly in the latter place, that the witnesses the defendant would produce at the trial were very numerous, and all resident in Bristol, and that the plaintiff was a person in indigent circumstances and unable to pay costs if she failed to obtain a verdict. *Smallcombe v. Williams*, 77

VIII. Trial.

1. *Hearing Counsel.*—See TROVER, 3.
2. *Postponing Trial.*—It is in the discretion of the judge at nisi prius to refuse or to allow a postponement of a trial, on the ground of the absence of a witness. *Turner v. Meryweather*, 251

IX. Costs of the Day.

A plaintiff is not entitled to move for costs of the day, unless he is present when the cause is called on. *Newton v. Chaplin*, 774

X. Nul tiel Record.

The statute 3 & 4 W. 4, c. 42, s. 23, does not authorise the amendment of the record upon the trial of an issue of nul tiel record. *Cooper v. Pennefather*, 739

XI. Inspection and Production of Documents.

1. The court refused to entertain an application by a defendant in an action on a bill of exchange, to compel the plaintiff, a stock-broker, to produce his book, kept pursuant to the 7 G. 2, c. 8, s. 9, in order to enable the defendant to plead that the bill, which was an accommodation bill, had been endorsed over to the plaintiff by the drawer, for differences in stock-jobbing transactions,—on the ground that the defendant had no direct interest in the book. *Pritchett v. Smart*, 625
2. *Semble*, that it is to the broker's principals that he is bound to produce the book. *Ib.*
3. *Semble*, that the court will not compel a party to produce a document, the production of which might subject him to penalties. *Ib.*

XII. Interpleader Rules—See INTERPLEADER.

XIII. Judgment for want of a Plea—See PLEADING, VIII., 5.

XIV. Judgment as in Case of a Nonsuit.

1. Upon a motion for judgment as in case of a nonsuit, for not proceeding to trial after notice, the affidavit need not allege that due notice of trial has been given. *Butler v. Frost*, 969
2. It is no objection to a rule for judgment as in case of a nonsuit, founded on an omission to proceed to trial pursuant to a notice, that such notice was given at an earlier period than, for anything shown by the defendant, it need have been given. *Ib.*

XV. Judgment non obstante veredicto—See CONFESSANT, I., 2.

XVI. Motions and Rules.

The court will not entertain a motion to discharge a rule for a *distringas*, on the ground

of alleged misstatements in the affidavit upon which it was obtained. *Ensor v. Griffin*, 781
And see ATTACHMENT.

XVII. Service of Rules.

1. Service of a rule to compute, by delivering it to "the landlord, at the residence of the defendant," is not sufficient. *Griffin v. Gilbert*, 101
2. Service of a rule to compute by delivering it to "the housekeeper at the residence of the defendant," *situate, &c.*, is not sufficient. *Lewis v. Blurton*, 102

XVIII. Oyer.

Upon a demand of oyer of a deed *prolat. in curiam* by the plaintiffs, their attorney delivered to the defendant's attorney a copy of the deed, with erasures and alterations in red ink, as they appeared on the face of the deed, although such alterations had been made without authority. The defendant thereupon set out the deed in his plea, *as altered*.—The court refused to set aside the plea, but allowed the plaintiff to redeliver oyer, in such form as he might be advised, on payment of costs. *Turquand v. Hennes*, 179

XIX. Payment of Money into Court—See COSTS, III.

XX. Profert—See PROPERTY.

XXI. Repleader—See REPLEADER.

PRIMA TONSURA, 484.

PRINCIPAL AND AGENT.

Undisclosed Principal.

1. The right of the seller of goods to resort to an undisclosed foreign principal, is barred by any circumstance which shows that the enforcement of that right would operate injustice. *Smyth v. Anderson*, 21
2. A., as agent of B., a merchant residing abroad, bought goods of C. At the time of the purchase, A. did not inform C. who was his principal; but the invoices described the goods as "bought on account of B., per A." C. afterwards drew upon A. for the amount, at four and six months, but A. became insolvent before either of the bills arrived at maturity. B., after receiving advice of the purchase, and of the acceptance of the bills by A., made large remittances to A. on account of these and other goods; and A., at the time of his stoppage, was considerably indebted to B.:—Held, that, under these circumstances, it was not competent to C. to sue B. for the price of the goods. *Ib.*

3. Held also, that the above defence was admissible under non assumpsit, *Smyth v. Anderson*, 21
4. Held also, that the books of C. were not admissible for the purpose of showing that B. had been throughout debited by him as principal. *Ib.*

And see FACTOR.

PROFERT.

It is unnecessary to make profert of deeds or other instruments which are set out by way of inducement only. *Lord Newborough v. Schröder*, 342

PROMISSORY NOTE.

See BILL OF EXCHANGE.

PROMOTIONS, 608.

PUBLIC COMPANY.

See JOINT-STOCK COMPANY.

QUARE IMPEDIT.

Changing Venue in—See PRACTICE, VII., 2.

QUEEN ANNE'S BOUNTY.

See ECCLESIASTICAL LEASE.

QUIET ENJOYMENT.

See COVENANT, I., 3.

QUIETUS.

Effect of entry of "*Et quietus est*," in reeve's account. 503

RAILWAY COMPANY.

I. Liability of, for Loss of Luggage.

1. Where a railway company employ porters at their stations to convey passengers' luggage from the railway carriages to the carriages or hired vehicles of the passengers, the liability of the company as carriers continues until the porters have discharged their duty. *Richards v. The London, Brighton, and South Coast Railway*, 839
2. In case against a railway company for the loss of a package, the first count of the declaration stated that the defendants were the owners and proprietors of a railway for the carriage and conveyance of passengers and their luggage, &c., from A. to B., for hire; that the defendants were common carriers for hire in and upon the said railway; that the wife of the plaintiff, at their request, became a passenger in and upon the railway, to be

carried and conveyed therein and thereby from A. to B., together with her luggage, consisting of a dressing-case, &c., also to be carried and conveyed by the defendants as such carriers in and upon the railway from A. to B., and there, to wit, at the station or terminus at B., safely and securely delivered for the plaintiff, for reasonable reward to the defendants in that behalf: and the breach alleged was, that the defendants, not regarding their duty, did not use due and proper care in and about the carriage and conveyance of the dressing-case from A. to B., but took so little and such bad care in and about the carrying and conveying the same, that, by and through the carelessness, negligence, and improper conduct of the defendants in the premises, the dressing-case was lost. It was proved that the plaintiff's wife became a passenger by a first-class carriage, to be conveyed from A. to B.; that the dressing-case was placed in the carriage, under the seat; that, on the arrival of the train at B., the porters of the company took upon themselves the duty of carrying the lady's luggage from the railway-carriage to the hackney-carriage which was to convey her to her residence; and that, on her arrival there, the dressing-case was missing:—Held, that the duty of the defendants as common carriers continued until the luggage was placed in the hackney-carriage; and that the evidence entitled the plaintiff to a verdict upon the first count. *Richards v. The London, Brighton, and South Coast Railway*, 839

3. *Carriers' Act*, 11 G. 4 & 1 W. 4, c. 68.]—To a declaration in case against common carriers for the loss of a trunk containing certain articles of jewellery and female apparel, the defendants pleaded, as to part of the goods in the declaration mentioned, to wit, the said articles of jewellery, one of the said dresses, &c. &c., that, at the time of the delivery to them, they were contained in the trunk in the declaration mentioned; that they were so delivered to the defendants after the passing of the statute 11 G. 4 & 1 W. 4, c. 68 (the carriers' act); that the said goods consisted of articles and property of the descriptions following, or of some or one of such descriptions, that is to say, gold or silver in a manufactured or unmanufactured state, &c. (enumerating the several articles mentioned in the 1st section of the act), and that their value exceeded 10*l.*; that, at the time of the receipt of the goods by them, the defendants had duly affixed the notice required by s. 2 of the act; and that the plaintiff gave them no notice of the nature or value of the goods, nor did she pay or tender the increased rate of charge demandable under the act:—Held,

that the plea was bad, for not alleging with certainty that the articles in question were articles of some or one of the descriptions mentioned in the act. *Smith v. The London, Brighton, and South Coast Railway Company*, 782

II. Railway Works.

A declaration in case charged the defendants, in the first count, with digging trenches across a lane over which the plaintiff had a right of way: in the second, with severing pipes which conveyed water to the plaintiff's messuage; and in the third, with stopping a drain for carrying away the foul water from the premises.

Plea, that by a certain act of parliament, the defendants were authorized to construct a certain railway; that they had agreed with the plaintiff for the purchase of a portion of the land of the plaintiff near to her messuage; that the making of the railway, and carrying the same *near to* the plaintiff's messuage, being likely to occasion injury and inconvenience to the plaintiff, it was agreed, that the defendants should pay to the plaintiff, for and in respect of the purchase of the said land, such a sum as should be sufficient to compensate her, not only for the value of such land, but also for all such injury and inconvenience as should necessarily arise from or be incidental to the making of the railway, and carrying the same *near to* the said messuage of the plaintiff; that, in pursuance of such agreement, and before the committing of the alleged grievances, by a deed between the plaintiff and certain other persons having an interest in the said land, the plaintiff and those other persons, in consideration of 575*l.*, &c., conveyed the land to the defendants for the purpose of making the railway; that it was declared by the deed, that the 575*l.* so paid should be, and then was, accepted and taken by the plaintiff and the other persons, for the purchase of the land, and by way of full compensation for all damage, loss, or inconvenience which could or might be sustained by them, or any of them, by severance, or otherwise by reason of the exercise of any of the powers of the act,—the said 575*l.* being the sum so theretofore agreed to be paid as aforesaid to compensate the plaintiff, not only for the price and value of the land, but also for all such injury and inconvenience as should necessarily arise from or be incidental to the making of the railway, and carrying the same *near to* the plaintiff's messuage. The plea then went on to aver, that the grievances complained of were part of the injury and inconvenience necessarily arising from and incidental to the making of the railway,

and carrying the same *near to* the plaintiff's messuage, and were part of the damage, loss, and inconvenience sustained by the plaintiff by reason of the exercise of the powers of the act, and intended to be compensated by and included in the said compensation money so paid as aforesaid.

The plaintiff, in her replication, cravedoyer of the deed, and demurred generally.

The deed, as set out onoyer, recited that the plaintiff and others had agreed to sell the land in question, and the defendants to purchase the same for the purposes of their railway, for the residue of a certain term therein; and that the plaintiff and the others had agreed to accept and take, and the defendants had agreed to pay 575*l.* for the said land, &c., "by way of full compensation for all damages, loss, or inconvenience whatsoever which could or might be sustained by any person or persons (except the reversioners), by severance, or otherwise by reason of the exercise of any of the powers of the said act upon the said lands, &c., so agreed to be purchased as aforesaid." It then proceeded to state that the plaintiff and others, in consideration of 575*l.* conveyed all their interest in the said portion of the said land to the defendants:—

Held, that the plea, as a plea of compensation, was bad in substance, inasmuch as the deed did not show that the 575*l.* was paid and received as compensation for the grievances complained of in the declaration:—

Held also, that the plea was not so framed as to show that the acts complained of were done under the authority of the act of parliament. *Pilgrim v. The Southampton and Dorchester Railway Company*, 206

RAILWAY SHARES.

See BROKER.

RECITALS.

In Deeds—See COVENANT, I, 3.

RE-ENTRY.

For Condition broken.

See CONDITION.

EJECTMENT, II.

REEVES' ACCOUNTS.

See EVIDENCE, IV.

REGISTERED COMPANY.

See JOINT-STOCK COMPANY.

RENTAL.

Admitted in evidence, 50*l.*

REPAIRS.

Quare, whether lessee under covenant to repair, is bound to re-enter upon evicting lessor, 284 (a).

REPLEADER.

Where awarded.

If one of several pleas traverses immaterial matter in the declaration, and the defendant pleads other material matters which are disposed of on proper issues raised upon them, the court will not award a repleader. *Crossfield v. Morrison*, 286

REPLEVIN.

Action on Bond.

1. *Bond, how taken.*—The jurisdiction of the old county-courts in replevin, is, by the 119th section of the 9 & 10 Vict. c. 95, transferred to the new courts established under that act. The sheriff must, however, still take a bond pursuant to the statute 11 G. 2, c. 19. *Edmonds v. Challis*, 413
But a bond conditioned for the obligor to appear "at the next county-court for the county of M., to be holden at the sheriff's office in, &c., and then and there to prosecute his suit with effect," &c., is bad. *Ib.*
2. *Damages.*—In an action against the sheriff for taking an insufficient replevin-bond, the reasonable measure of damages, is, the amount of the rent and the expenses of the distress. *Ib.*
3. *Form of Declaration.*—The declaration alleged that the (old) county-court had not jurisdiction at the time of taking the bond:—Held, on motion in arrest of judgment, that the declaration was sufficient, without alleging a want of jurisdiction at the time of the plaint to the sheriff. *Ib.*
4. *Subscribing Witness.*—At the trial of an action against the sheriff for taking insufficient pledges in replevin, notice having been given to the defendants to produce the bond, the plaintiff's counsel called for it; and, on the defendants' counsel declining to produce it, a copy obtained from the sheriff's office was put in, and was about to be read, when the defendants' counsel interposed, and offered the original, and then objected that it could not be read, without calling the subscribing witness. The judge overruled the objection:—Held, that he was right in so doing. *Ib.*

And see PLEADING, VI.

RESTRAINT OF TRADE.

See AGREEMENT.

REVERSION IN FEE.

See DEVISE, 2.

ROMESCOT, 477 (d).

RULE TO COMPUTE.

See PRACTICE, XVII.

SALE.

Of Goods—*See CONTRACT.*

SECURITY FOR COSTS.

On Interpleader Rule—*See INTERPLEADER, 2.*

SERVICE OF RULES.

See PRACTICE, XVII.

SET-OFF.

Replication to a Plea of.—To assumpsit for use and occupation, money paid, &c., the defendant pleaded a set-off, alleging that the plaintiff, before and at the commencement of the suit, was, and still is, indebted to the defendant, &c.; to which the plaintiff replied that he "was not indebted to the defendant, in manner and form," &c.:—Held, that this was a sufficiently direct traverse of the continued existence of the supposed debt alleged in the plea. *Morrison v. Chadwick*, 266
Informality of usual replication to plea of. 285 (a).

And see BOND.

COUNTY-COURT, III.
FACTOR.

SHARES.

See BROKER.

SHERIFF.

See REPLEVIN.

SLANDER.

See PRACTICE, VI.

STEWARDS' ACCOUNTS, 498.

And see EVIDENCE, IV.

SHIP AND SHIPPING.

Liability of Owner for a Conversion by the Master—*See TROVER, I.*

STATUTE OF LIMITATION.

See LIMITATION OF ACTIONS.

STOCK-EXCHANGE.

Regulations of—*See BROKER.*

SUBSCRIBING-WITNESS.

See EVIDENCE, I.

SUGGESTION.

Of Death of a Party—See PRACTICE, I., 8.

SUMMONS.

Writ of—See PRACTICE, I.

SURGEON'S BOOK.

Evidence by entry in, 487.

SURRENDER.

See LANDLORD AND TENANT, II.

SWARTREES, 474.

TAUNTON DEANE, MANOR OF.

An ancient possession of the see of Winchester, 456.

Ancient name of, 456 (a).

Exchequer of Taunton, 463 (a).

Divisions of manor.

Hundreds, borough, liberty, and tithings, 463.

Officers of manor.

Reeves of hundreds, and of Taunton borough, 479 (b).

Bailiff of Taunton liberty, 463 (b), 479 (b).

Beadles of hundreds, 479 (b).

Woodwards, 463.

Survey of manor, 1572, 468.

Customs of manor.

Admittance disused, 460 (b).

"At the will of the lord," *ib.* •

Bond-land, 468 (g).

Choice-courts, 479 (b).

Conditional surrenders, 471 (a).

Corrodies, 471, 471 (a), 473, 475.

Customary estate vests in surrenderee, upon entering and fining, without admittance, 460 (b).

Dayne of land, 472.

Dayne surrender, 469 (a).

Descent of customary estate to husband as heir of wife, and to wife as heir of husband, 459 (b), 468.

Entry and fine to complete title of husband as heir to wife, 459 (b), 468.

Entry and fine to complete title of surrenderee, 459 (b).

Fine-paper, 468.

Overland, 468 (g).

Pipe-rolls of manor, 463 (a).

Timber, property in, vested in customary tenant of the land, 505 (a).

Accounts of reeves, &c., with lord of manor.

Matters for which accountant charges himself

Arrears, 465.

Accounts, &c. (continued.)

Redditus assise, *ib.*

Consuetudine, *ib.*

Annuales recognitiones, 466.

Vendicio herietorum, *ib.*

Vendicio bosci, 467.

Vendicio pasture, *ib.*

Firme, *ib.*

Vendicio operum, *ib.*

Fines et maritagia, 468.

Perquisita curie, 476.

Matters for which accountant takes credit with lord.

Acquietancie redditus et operum, 477.

Defectus reddituum, 478.

Denarii liberati, 479.

Mills, repairs of manor mills, 477.

Quietus, 503.

Vivary, 478.

Winchester, officers of manor not to be drawn further from Taunton than, 479 (c).

TENANTS IN COMMON.

I. *Trespass by one against his Co-tenant.*

Trespass quare clausum fregit lies by tenant in common against co-tenant, where actual expulsion. *Murray v. Hall*, 441

II. *Trover by one against his Co-tenant.*

1. One of two tenants in common of a chattel is not liable in trover at the suit of his co-tenant, for the mere sale of the chattel: though he may be, for such a disposition as amounts to a destruction of it. *Mayhew v. Herrick*, 229
2. The defendant, an officer of the Palace Court, seized, under a *fi. fa.* against A., partnership effects of A. and B., and sold them to various purchasers, who carried them away. In trover at the suit of the assignees of B. (who had become bankrupt):—Held, that the seizure and sale, under the circumstances, did not amount to a conversion: but that, in the absence of any evidence to show in what proportions the partners were interested in the partnership property, the assignees of B. were entitled to a moiety of the proceeds of the sale. *Id.*

How seized,

455 (a)

TITLE.

Deduction of—See PLEADING, VIII., 2.

And see COVENANT, I., 3.

TOLL-BOOK.

Evidence by entries in, 498.

TRADE.

Restraint of—See AGREEMENT.

TRESPASS.

- I. *Plea of not possessed*—See PLEADING, VII.
 II. *By one Tenant in Common against his Co-Tenant*—See TENANTS IN COMMON, I.

TRIAL.

Postponement of—See PRACTICE, VIII., 2.

TROVER.

I. *Where maintainable.*

1. Trover lies against a ship-owner for a sale by the master of goods, at a place short of their port of destination, under circumstances not inconsistent with the general scope of the authority conferred upon the master by the owner. *Ewbank v. Nutting*, 797
2. A cargo of salt was shipped by the plaintiff at Liverpool, for Calcutta, under a bill of lading making the same deliverable to A. & Co., on payment of freight there, "as per charter-party." The ship sustained damage in quitting the harbour at Liverpool, and ultimately became so leaky that the master was compelled to run for Bahia, where, finding the state of the ship such as to render her incapable of continuing the voyage, and being unable to forward the salt to its destination, he sold it by public auction,—remitting the proceeds to his owner, who tendered the amount, after making deductions for general average and expenses to the plaintiffs:—Held, that the master and owner were jointly liable for the conversion;—that it was not necessary for the plaintiff to give the charter-party in evidence;—and that the jury were warranted in estimating the damages at the cost price of the salt and the sum which the plaintiff had paid on account of freight. 16.
3. The two defendants severed in pleading, and appeared by different attorneys and different counsel,—*quære* whether each counsel was entitled to address the jury? 16.

II. *Evidence of Conversion.*

A., the endorser of a dishonoured bill, having paid the amount to B., the holder, demands the bill from B., who refers him to his (B.'s) attorney. A. refusing to go to the attorney,

B. says, "Then call on Saturday, and in the mean time I will get it for you." A. calls on Saturday, but does not obtain the bill:—This is not evidence of a conversion. *Towne v. Lewis*, 608

III. *Between Tenants in Common*—See TENANTS IN COMMON, II.

VENUE.

Changing—See PRACTICE, VII.

VOLUNTARY PAYMENT.

See MONEY PAID.

WARRANT OF ATTORNEY.

See BANKRUPT, III.

WASTE.

See PRACTICE, XIV.

WILL.

Allegation of proof of, 402 (A).

WITNESS.

See EVIDENCE.

Commission to examine—See EVIDENCE, II.

WRIT OF SUMMONS.

See PRACTICE, I., 1—4.

WRIT OF DISTINGUISHING.

See PRACTICE, I., 5, 6, 7.

WRIT OF ELEGIT.

See PRACTICE, I., 8.

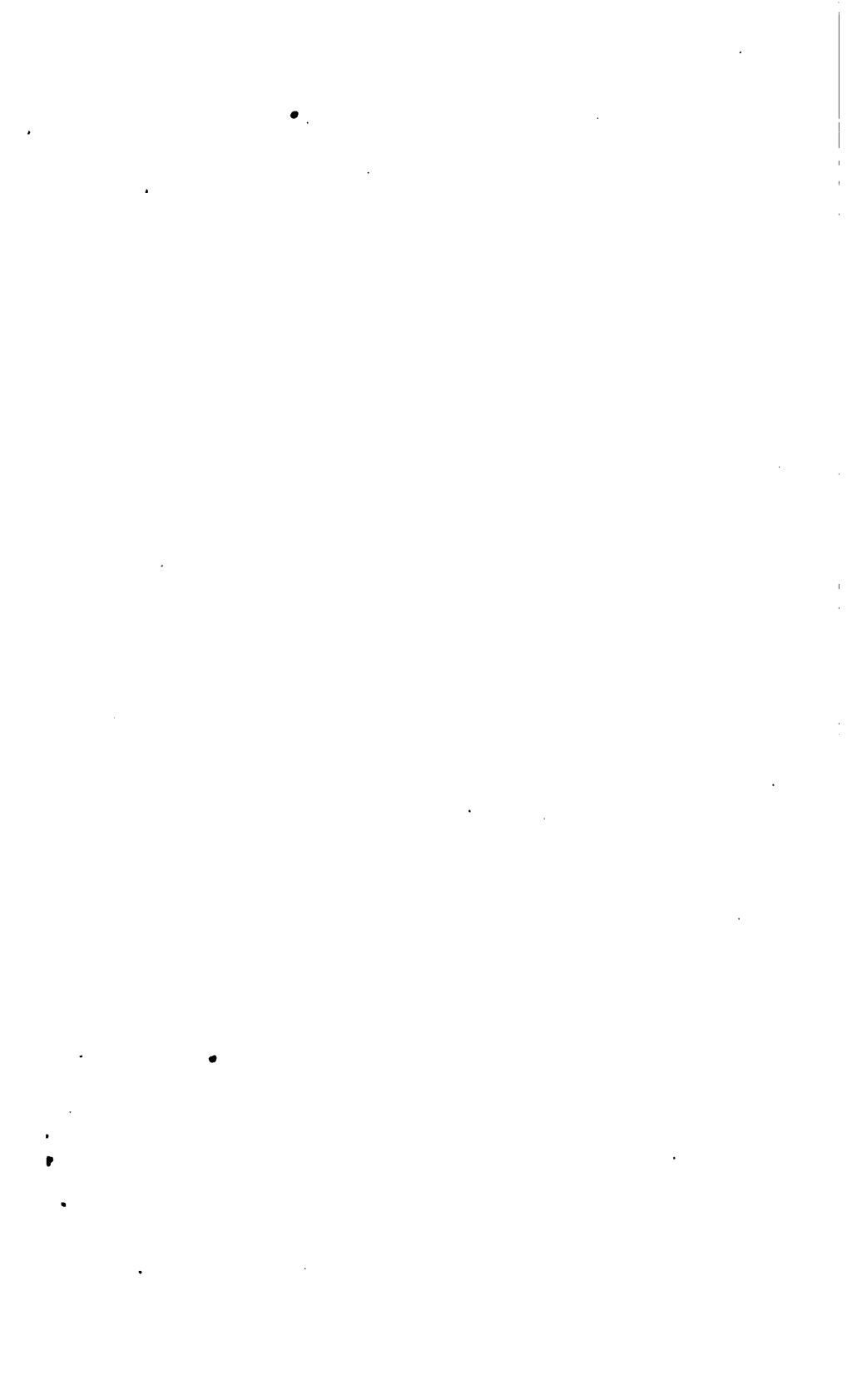
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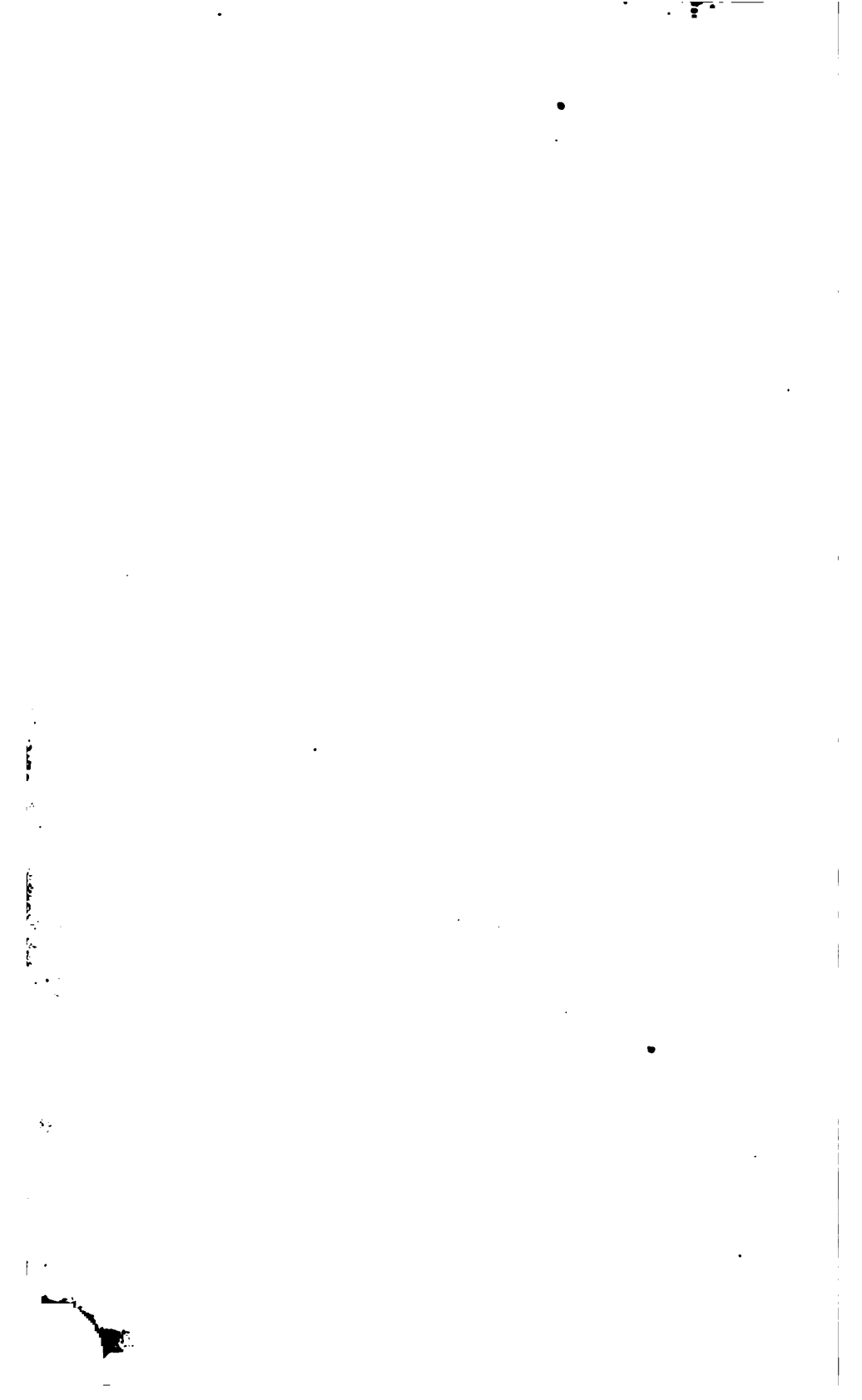
Particulars of Demand.

It is no ground for a new trial of an action before the secondary or under-sheriff, that the particulars of demand are not annexed to the writ of trial. *Hamber v. Roberts*, 861













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